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In The

Supreme Court of the United States

LEROY BACA,

Petitioner,

v.

S.A. THOMAS and E.P. GIPSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Ninth Circuit have entertained an interlocutory appeal seeking review of a District Court's ruling that, absent extraordinary circumstances, it is *per se* unconstitutional for an inmate to temporarily sleep on a mattress placed on a jail floor – where the District Court certified its ruling for immediate interlocutory review; the subject ruling is in direct conflict with rulings from other Circuits; the law within the Ninth Circuit remains unsettled; and the Ninth Circuit's review of the District Court's ruling would have provided additional constitutional guidance to courts and jail administrators throughout the country?

LIST OF PARTIES (Rule 14.1(b))

The petitioner is Leroy D. Baca, Sheriff of Los Angeles County, who was a defendant in the proceedings below. Respondents S.A. Thomas and E.P. Gipson were the plaintiffs below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES (Rule 14.1(b))	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	6
I. INTRODUCTION	6
II. THIS INTERLOCUTORY APPEAL WOULD HAVE ENABLED THE NINTH CIRCUIT TO RECONCILE CONFLICTS WITH OTHER CIRCUITS AND TO OFFER VALUABLE INSIGHT ON WHETHER FLOOR SLEEPING IS UNCONSTITUTIONAL	10
A. The District Court's Ruling Is In Direct Conflict With The Holdings Reached In Numerous Other Cases That Floor Sleeping Is Not *Per Se* Unconstitutional	11
B. The Ninth Circuit's Refusal To Hear The Interlocutory Appeal Assures That The Law On The Issue Will Remain Unsettled Within The Ninth Circuit	16

TABLE OF CONTENTS – Continued

Page

III. THE DISTRICT COURT'S FLAWED ANALYSIS CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENT AND MUST BE IMMEDIATELY CORRECTED.... 24

IV. THE NINTH CIRCUIT ABUSED ITS DISCRETION IN REFUSING TO HEAR THE INTERLOCUTORY APPEAL 26

A. An Interlocutory Appeal Will Determine A Controlling Issue Of Law In The Instant Case 28

B. Substantial Grounds For Disagreement Exist As To Whether Custodial Floor Sleeping Constitutes A *Per Se* Violation Of Eighth And Fourteenth Amendment Rights..... 29

C. An Interlocutory Appeal Will Materially Advance The Ultimate Termination Of The Litigation..... 30

V. THIS MATTER IS APPROPRIATE FOR SUMMARY DISPOSITION UNDER RULE 16 32

CONCLUSION..... 33

TABLE OF CONTENTS – Continued

Page

APPENDIX:

Order of the United States Court of Appeals for the Ninth Circuit, *Thomas, et al. v. Baca,* No. 08-80012 (April 16, 2008) .....App. 1

Order of the United States District Court, Central District of California, Granting in Part and Denying in Part Plaintiffs' Renewed Motion for Summary Adjudication and Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, Or, In the Alternative, Summary Adjudication, *Thomas, et al. v. Baca,* No. CV-04-08448-DDP (SHx) (Sep. 21, 2007) .....App. 2-40

Order of the United States District Court, Central District of California, Granting Application for Certification of Interlocutory Appeal *Thomas, et al. v. Baca,* No. CV-04-08448-DDP (SHx) (Jan. 11, 2008) .....App. 41-45

Order of the United States Court of Appeals for the Ninth Circuit, *Thomas, et al. v. Baca,* No. 08-80012 (May 20, 2008).....App. 46

TABLE OF AUTHORITIES

Page

CASES

Albano v. Mitchell, 1998 WL 101743 (N.D. Cal. 1998) 22

Allen v. City and County of Honolulu, 816 F.Supp. 1501 (D. Hawaii 1993) 21

Altman v. Loggins, 2008 WL 3539513 (W.D. Ark. 2008) 13, 14

Anela v. Wildwood, 790 F.2d 1063 (3d Cir. 1986) 12

Avalos v. Baca, 517 F.Supp.2d 1156 (C.D. Cal. 2007) 7

Balla v. Board of Corrections, 656 F.Supp. 1108 (D. Idaho 1987) 22

Bell v. Wolfish, 441 U.S. 520 (1979) 8, 23, 25

Block v. Rutherford, 468 U.S. 576 (1984) 7, 8, 24, 25

Capps v. Atiyeh, 495 F.Supp. 802 (D. Or. 1980) 22

Cisco Systems, Inc. v. California Workers' Compensation Appeals Board, 2001 WL 34780587 (N.D. Cal. 2001) 27

Ferguson v. Cape Girardeau County, 88 F.3d 647 (8th Cir. 1996) 8

Fillmore v. Eichkorn, 891 F.Supp. 1482 (D. Kansas 1995) 13

Hamm v. DeKalb County, 774 F.2d 1567 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986) 8, 11, 23

TABLE OF AUTHORITIES – Continued

Page

Hansen v. Schubert, 459 F.Supp.2d 973 (E.D. Cal. 2006) 30

Hernandez v. Denton, 861 F.2d 1421 (9th Cir. 1988), *vacated on other grounds sub nom.*, 493 U.S. 801, 110 S.Ct. 37 (1989) 19, 20

Hohn v. United States, 524 U.S. 236 (1998) 2

Horton v. Erwin County Jail, 2007 U.S. Dist. LEXIS 53759 (E.D. Ten. 2007) 13, 14

Hubbard v. Taylor, 538 F.3d 229, 2008 U.S. App. LEXIS 16545 (3d Cir. 2008) 14, 15

Hughes v. Smith, 237 Fed.Appx. 756 (3d Cir. 2007) 8, 11

In re Cement Antitrust Litigation, 673 F.2d 1020 (9th Cir. 1982), *aff'd* 459 U.S. 1190 (1983) 27, 28

Isbell v. Strode, 2007 WL 2460992 (W.D. Ky. 2007) 13

Jones v. Barnes, 198 Fed.Appx. 308 (4th Cir. 2006) 8, 11

Lane v. Culp, 2007 WL 954101 (W.D. Pa. 2007) 14

Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981) 14, 15

Loya v. Bd. of County Comm'rs, 1992 WL 176131 (D. Idaho 1992) 22

Lucero v. Regents of University of California, 1993 WL 341287 (N.D. Cal. 1993) 27

Lyons v. Powell, 838 F.2d 28 (1st Cir. 1988) 8, 11, 12

TABLE OF AUTHORITIES – Continued

Page

Mann v. Smith, 796 F.2d 79 (5th Cir. 1986) 12, 13

Martin v. Sullivan, 2007 WL 2462076 (E.D. Cal. 2007) 20, 21

Mathias v. Simpkins, 2007 U.S. Dist. LEXIS 39573 (W.D. Va. 2007).....14

Mortimer v. Baca, 478 F.Supp.2d 1171 (C.D. Cal. 2007) 7

Mounce v. Harris, 2006 WL 133571 (E.D. Ky. 2006).....13

Paige v. Hudson, 341 F.3d 642 (7th Cir. 2003) 8, 11

Perkins v. Kansas Department of Corrections, 1997 WL 383072 (D. Kan. 1997).....14

Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988).....8, 11

Prasko v. Board of County Com'rs for Coffey County, 2000 WL 1880312 (D. Kan. 2000).....14

Ramirez v. City, County of San Francisco, 1997 WL 33013 (N.D. Cal. 1997).....21

Rayner v. Rees, 2007 WL 2000080 (W.D. Ky. 2007).....13

Rutherford v. Pitchess, 457 F.Supp. 104 (C.D. Cal. 1978) 18

Small v. Myers, 2006 WL 1454779, *7 (D. S.C. 2006).....14

Tesch v. County of Green Lake, 157 F.3d 465 (7th Cir. 1998) 8, 11

TABLE OF AUTHORITIES – Continued

Page

Thomas v. Baca, 514 F.Supp.2d 1201 (C.D. Cal. 2007) 7

Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989) 16, 17, 18, 20

Tilden v. Haynes, 2007 WL 2681100 (W.D. Ark. 2007) 13

U.S. ex rel. Huangyan Import & Export Corp. v. Nature's Farm Products, Inc., 370 F.Supp.2d 993 (N.D. Cal. 2005) 27

Valdez v. Rosenbaum, 302 F.3d 1039 (9th Cir. 2002) 24

Westbrook v. Archey, 2006 WL 3191559 (N.D. Ind. 2006) 14

Williams v. Browning, 2006 WL 83433 (S.D. Tex. 2006) 13

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 2, 26, 27

42 U.S.C. § 1983 3

FEDERAL STATUTES

Federal Rules of Appellate Procedure, Rule 5(a)(1) 2

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Eighth Amendment to the United States Constitution 3, 6, 7, 19, 29

Fourteenth Amendment to the United States Constitution 6, 7, 29

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit denying Defendant-Petitioner's Petition for Leave to File an Interlocutory Appeal is reprinted at Appendix ("App.") 1. The District Court's Order Granting in Part and Denying in Part Plaintiffs' Renewed Motion for Summary Adjudication and Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, published at 514 F.Supp.2d 1201, filed on September 21, 2007, is reprinted at App. 2-40. The District Court's Order granting Defendant-Petitioner's Application to Certify an Interlocutory Appeal, filed on January 11, 2008, is reprinted at App. 41-45. The Order of the United States Court of Appeals for the Ninth Circuit denying Defendant-Petitioner's Motion for Rehearing *En Banc* is reprinted at App. 46.

JURISDICTION

The Court of Appeals for the Ninth Circuit denied a timely petition for rehearing *en banc* on May 20, 2008. (App. 46.) On August 11, 2008, this Court granted the Application of Defendant-Petitioner ("Defendant") Baca for Extension of Time to file a petition for writ of certiorari, permitting Defendant until October 2, 2008 to file the Petition.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). This Court has jurisdiction to review a denial of a certificate of appealability by the Ninth Circuit. *See, Hohn v. United States*, 524 U.S. 236, 246 (1998).

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions relevant to this Petition are as follows:

1. 28 U.S.C. § 1292(b) provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . .

2. Rule 5(a)(1) of the Federal Rules of Appellate Procedure provides:

> To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

3. The Eighth Amendment to the Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. The Fourteenth Amendment to the Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

> proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable . . .

STATEMENT OF THE CASE

Plaintiffs-Respondents S.A. Thomas and E.L. Gipson ("Plaintiffs") brought this action against Defendant-Petitioner ("Defendant") Leroy D. Baca, Sheriff of Los Angeles County, on behalf of themselves and a class of inmates claiming they were required to temporarily sleep on floor mattresses while incarcerated at various Los Angeles County Jail ("LACJ") custody facilities.[1] (App. 3.) On May 17, 2005, the District Court certified a damages class of "individuals who, while in LASD custody, were required to sleep on the floor of a LASD facility with or without bedding."[2] (App. 3.) Plaintiffs have estimated the class to consist of at least 25,000 inmates.[3]

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[1] The LACJ system is operated by the Los Angeles County Sheriff's Department ("LASD").

[2] References to inmates temporarily sleeping on mattresses placed on the jail floor will be hereinafter referred to as "floor sleeping."

[3] Plaintiffs asserted this estimate in an opposition to Defendant's Motion to Decertify the Class.

On April 3, 2006, Plaintiffs filed a Motion for Summary Adjudication, arguing that requiring inmates to temporarily sleep on floor mattresses violates inmates' Eighth and Fourteenth Amendment rights as a matter of law. (App. 3.) Defendant opposed Plaintiffs' Motion on various grounds, including the fact that most courts across the country (all but one, in fact) have held that the question of whether inmate floor sleeping is a constitutional violation depends on the facts and circumstances of each instance in which an inmate temporarily slept on a floor mattress. (App. 3-4.) Defendant also filed a Motion for Summary Judgment, or, in the Alternative, Summary Adjudication on June 28, 2006. (App. 3-4.)

On September 21, 2007, the District Court entered an Order granting in part and denying in part the parties' summary judgment motions. (App. 2-40.) The District Court ruled, in relevant part: (1) there exists a custom of floor sleeping in the LASD jail system; and (2) the "practice of requiring inmates to sleep on the floor of LASD jails violates the Eighth Amendment" and thus is unconstitutional as a matter of law, regardless of circumstances. (App. 20-40.)

On January 11, 2008, the District Court granted Defendant's motion to certify an interlocutory appeal from its order on the motions for summary judgment/adjudication. (App. 41-45.) The District Court found that all of the requirements for certification were satisfied, acknowledging that: (1) the issue is a controlling issue of law that will ultimately be dispositive of liability; (2) there are substantial

grounds for disagreement on the issue, as evidenced by the conflicting Circuit and District Court opinions by courts that have ruled on the issue; and (3) it would be a waste of judicial resources to conduct a time-consuming and expensive class action trial on damages in the event the District Court's ruling is reversed on appeal. (App. 43-45.)

Defendant thereafter petitioned the Ninth Circuit for leave to file an interlocutory appeal. The petition was summarily denied on April 16, 2008. (App. 1.) In contrast to the District Court's order, which provided a thorough analysis of the three factors to be weighed in determining the propriety of an interlocutory appeal, the Ninth Circuit provided no reasoning and no explanation for its decision. (App. 1.) The Ninth Circuit subsequently denied Defendant's petition for rehearing *en banc*, again without explanation. (App. 46.) Defendant now asks this Court to review, and summarily reverse, the Ninth Circuit's refusal to hear the interlocutory appeal.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION.

The question of whether having detainees temporarily sleep on floor mattresses violates their Eighth and Fourteenth Amendment rights is of great relevance, as jailers nationwide are forced to make decisions about inmate housing in the face of increasing jail and prison overcrowding. The ultimate

question in a case such as this is the flexibility that should be afforded to jailers in making decisions to alleviate the problem.

The instant case arises out of the nation's largest county jail system. The Los Angeles County jail processes almost 200,000 inmates per year, and at any given time houses approximately 20,000 inmates. *See, e.g., Block v. Rutherford*, 468 U.S. 576, 577, 583 (1978) (noting the size of the Los Angeles County Jail system); *Thomas v. Baca*, 514 F.Supp.2d 1201, 1218 (C.D. Cal. 2007) ("Los Angeles County Jail is the largest jail in the country."); *Mortimer v. Baca*, 478 F.Supp.2d 1171, 1179 (C.D. Cal. 2007) ("[t]he LASD processes tens of thousands of detainees every year"); *Avalos v. Baca*, 517 F.Supp.2d 1156, 1164 (C.D. Cal. 2007) (quoting *Mortimer*). Like many jail and prison systems nationwide plagued with overcrowding, the Los Angles County jail has had to make difficult decisions regarding inmate housing. Because of the size of the jail, and the problems inherent in operating a system with such a large inmate population, this litigation is a leading case on the issue of inmate floor sleeping.

The District Court held that the practice of having inmates temporarily sleep on mattresses on the floor violates the Eighth or Fourteenth Amendment as a matter of law, regardless of the circumstances of each instance of floor sleeping. It matters not to the District Court that Defendant may place inmates in a clean, dry, well lit area, with adequate bedding (such as mattresses and blankets) and space.

According to the District Court, if the inmate does not have a bunk there is a constitutional violation, regardless of the specific nature and overall quality of the inmate's sleeping arrangements. This blanket rule cannot be reconciled with the many cases that have held that individualized factual inquiries are necessary to determine whether an inmate's sleeping conditions rise to the level of a constitutional violation. *See, e.g., Lyons v. Powell*, 838 F.2d 28, 31 (1st Cir. 1988); *Hughes v. Smith*, 237 Fed.Appx. 756, 760 (3d Cir. 2007); *Peterkin v. Jeffes*, 855 F.2d 1021, 1026-7 (3d Cir. 1988); *Jones v. Barnes*, 198 Fed.Appx. 308 (4th Cir. 2006); *Tesch v. County of Green Lake*, 157 F.3d 465, 476 (7th Cir. 1998); *Paige v. Hudson*, 341 F.3d 642 (7th Cir. 2003); *Ferguson v. Cape Girardeau County*, 88 F.3d 647, 650 (8th Cir. 1996); *Hamm v. DeKalb County*, 774 F.2d 1567, 1575 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986).

Not only does the District Court's ruling conflict with the holdings in a myriad of other cases, it represents the improper usurping of the broad discretion courts have been instructed to afford jail officials tasked with maintaining the operational security of jail facilities, and the health and safety of the inmates housed at these facilities. *See, Bell v. Wolfish*, 441 U.S. 520 (1979) and *Block v. Rutherford*, *supra*, 468 U.S. at 583.

Notwithstanding the erroneous reasoning employed to reach its ruling, the District Court clearly recognized the importance of the constitutional questions at issue and the need for guidance from the

Ninth Circuit by certifying its ruling for immediate, interlocutory appeal. The Ninth Circuit, however, summarily refused to entertain the appeal. By delaying its involvement in this action until a much later juncture, the Ninth Circuit will necessarily compel the parties to navigate through extraordinarily burdensome and expensive phases of class action litigation, encumbering the District Court with an extremely time-consuming and resources-draining task that may be rendered moot when this issue is presented to the Ninth Circuit again. The Ninth Circuit's decision is even more perplexing in light of the fact that this certified interlocutory appeal presented an ideal opportunity for the establishment of much-needed guidance within the Ninth Circuit, as well as courts and litigants throughout the country.

Simply put, the Ninth Circuit abused its discretion by refusing to honor the District Court's request for immediate review of its ruling that "floor sleeping" is *per se* unconstitutional. The Ninth Circuit's involvement at this stage would have allowed it to redress the heretofore unsettled law in the Ninth Circuit and scrutinize a blanket constitutional ruling with dangerous implications on the operation of jail and prison facilities throughout the country – a ruling that cannot be reconciled with almost every other case that has addressed this important issue of law.

II. THIS INTERLOCUTORY APPEAL WOULD HAVE ENABLED THE NINTH CIRCUIT TO RECONCILE CONFLICTS WITH OTHER CIRCUITS AND TO OFFER VALUABLE INSIGHT ON WHETHER FLOOR SLEEPING IS UNCONSTITUTIONAL.

The District Court's ruling *conflicts* with the rulings of other district courts within the Ninth Circuit, as well as the rulings of the vast majority of federal courts outside the Ninth Circuit that have decided the issue of whether floor sleeping violates the constitutional rights of inmates as a fact specific inquiry. By refusing to hear Defendant's interlocutory appeal, the Ninth Circuit assured not only that the law on the issue of floor sleeping will remain unsettled within the Ninth Circuit, but also that other federal courts will be deprived of its guidance in deciding cases involving allegations of floor sleeping. The Ninth Circuit refused to hear the interlocutory appeal despite the District Court's acknowledgement that such guidance is necessary and an interlocutory appeal appropriate. Ordering the Ninth Circuit to hear the interlocutory appeal will help bring immediate clarity to this constitutional inquiry.

A. The District Court's Ruling Is In Direct Conflict With The Holdings Reached In Numerous Other Cases That Floor Sleeping Is Not *Per Se* Unconstitutional.

The absence of Ninth Circuit authority on the issue of when an inmate's constitutional rights are violated as a result of temporarily sleeping on a floor mattress permitted the District Court to ignore the overwhelming weight of authority that floor sleeping does *not* necessarily violate the constitutional rights of inmates. The First, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits, for example, have held that whether an inmate's constitutional rights are violated by having to temporarily sleep on a floor mattress depends on context. *See, e.g., Lyons v. Powell*, 838 F.2d 28, 31 (1st Cir. 1988); *Hughes v. Smith*, 237 Fed.Appx. 756, 760 (3d Cir. 2007); *Peterkin v. Jeffes*, 855 F.2d 1021, 1026-7 (3d Cir. 1988); *Jones v. Barnes*, 198 Fed.Appx. 308 (4th Cir. 2006); *Tesch v. County of Green Lake*, 157 F.3d 465, 476 (7th Cir. 1998); *Paige v. Hudson*, 341 F.3d 642 (7th Cir. 2003); *Ferguson v. Cape Girardeau County*, 88 F.3d 647, 650 (8th Cir. 1996); *Hamm v. DeKalb County*, 774 F.2d 1567, 1575 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986).[4] These courts have held that the

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[4] The District Court dismissed *Hamm* on grounds that it upheld summary judgment "without considering the detailed facts of the floor sleeping." This is ironic since the District Court reached the opposite conclusion as the *Hamm* court did, also without considering the detailed facts of the floor sleeping

(Continued on following page)

question of whether a plaintiff may assert a civil rights claim for floor sleeping depends on the facts and circumstances of each incident of floor sleeping; in other words, floor sleeping may or may not violate the Eighth and Fourteenth Amendments, depending on what other factors or conditions may be present.[5]

The Fifth Circuit addressed the issue in a different context in *Mann v. Smith*, 796 F.2d 79, 85 (5th Cir. 1986). In *Mann*, the plaintiff alleged his constitutional rights were violated because his cell was too small to allow him adequate physical exercise. *Id.* When the defendant argued that the plaintiff was in the cell voluntarily, the plaintiff responded that he only agreed to be placed in the cell because he did not

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asserted by the named Plaintiffs. This statement by the Court further illustrates its confusion and flawed reasoning.

[5] The District Court cited *Lyons v. Powell* in support of its decision that floor sleeping necessarily violates the Eighth Amendment. (App. 31.) Although the First Circuit in *Lyons* held that a floor sleeping allegation states a claim under the Eighth Amendment, it also stated that "whether the use of floor mattresses amounts to punishment *must be viewed in light of whether such a practice causes the detainee 'to endure genuine privations and hardship . . . ,' [Citation] and whether it serves to accomplish a legitimate governmental objective.*" *Lyons, supra*, 838 F.2d at 31. In other words, the First Circuit held that floor sleeping may or may not violate the Eighth Amendment, depending on the circumstances. The same is true with respect to the District Court's citation of *Anela v. Wildwood*, 790 F.2d 1063, 1069 (3d Cir. 1986), which held that the plaintiffs stated a claim for unconstitutional conditions of confinement when they were deprived of not only a bed, but also a mattress, food, and drinking water.

want to sleep on a mattress on the floor in a larger, general population cell, and that he should not be required to choose between two unconstitutional conditions. *Id.* The Fifth Circuit rejected this argument, stating that "[the plaintiff] has cited no case holding that the Constitution requires elevated beds for prisoners, and we know of no source for such a right." *Id.* The Fifth Circuit was therefore faced with the very question of whether a floor sleeping allegation, devoid of any factual context (because the plaintiff did not actually sleep on the floor), states a cognizable claim. The Fifth Circuit definitively rejected such a claim. Although the District Court acknowledged *Mann* in its order, it dismissed the case, without explanation, as simply unpersuasive. (App. 32.)

Although the Sixth and Tenth Circuits have not addressed the issue, district courts within those Circuits are equally unanimous in holding that whether floor sleeping violates the Eighth or Fourteenth Amendments is a fact specific inquiry. *See, e.g., Williams v. Browning*, 2006 WL 83433 (S.D. Tex. 2006); *Isbell v. Strode*, 2007 WL 2460992, *1-2 (W.D. Ky. 2007); *Rayner v. Rees*, 2007 WL 2000080, *5 (W.D. Ky. 2007); *Horton v. Erwin County Jail*, 2007 U.S. Dist. LEXIS 53759 (E.D. Ten. 2007); *Mounce v. Harris*, 2006 WL 133571, *14 (E.D. Ky. 2006); *Tilden v. Haynes*, 2007 WL 2681100, *5 (W.D. Ark. 2007); *Altman v. Loggins*, 2008 WL 3539513 at *9 (W.D. Ark. 2008); *Fillmore v. Eichkorn*, 891 F.Supp.

1482 (D. Kansas 1995); *Perkins v. Kansas Department of Corrections*, 1997 WL 383072 (D. Kan. 1997); *Prasko v. Board of County Com'rs for Coffey County*, 2000 WL 1880312 (D. Kan. 2000). In all of these cases, it was held that an incident of floor sleeping was *not* unconstitutional because the circumstances did not amount to punishment.

Courts that have visited the issue recently (many of them subsequent to the District Court's ruling on summary judgment in this case) are similarly unanimous in applying the foregoing analysis. *See, e.g.*, *Lane v. Culp*, 2007 WL 954101, *5 (W.D. Pa. 2007); *Horton v. Erwin County Jail*, 2007 U.S. Dist. LEXIS 53759 (E.D. Ten. 2007); *Mathias v. Simpkins*, 2007 U.S. Dist. LEXIS 39573 (W.D. Va. 2007); *Small v. Myers*, 2006 WL 1454779, *7 (D. S.C. 2006); *Westbrook v. Archey*, 2006 WL 3191559 (N.D. Ind. 2006); *Altman v. Loggins*, 2008 WL 3539513 at *9 (W.D. Ark. 2008). Only two months ago, in *Hubbard v. Taylor*, 538 F.3d 229, 2008 U.S. App. LEXIS 16545 at *11-15 (3d Cir. 2008), the Third Circuit held that requiring inmates to sleep on mattresses placed on the floor for periods of three to seven months did not violate their Fourteenth Amendment rights.

Indeed, Defendant has been able to locate only one authority, *Lareau v. Manson*, 651 F.2d 96, 105 (2d Cir. 1981), that held that floor sleeping violates an inmate's constitutional rights as a matter of law. Prior to the District Court's order in this case, any persuasive value to *Lareau* (which was decided nearly three decades ago) had arguably been vitiated by the

parade of decisions since 1981 holding that the question is fact specific and based on context. Indeed, *Lareau* has been criticized for its reasoning, most recently in *Hubbard*. *Hubbard*, *supra*, 208 U.S. App. LEXIS at *11-15. Thus, while *Lareau* can be said to have given rise to a conflict among the Circuits on this issue, until recently the case had become so antiquated by decades of contrary rulings from other federal courts that it held little sway. Indeed, it can fairly be said that the First, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits do not find *Lareau* persuasive.

The District Court's flawed ruling in this case, and the Ninth Circuit's refusal to hear an interlocutory appeal from that ruling, has revived *Lareau* and its notion that floor sleeping violates the constitutional rights of inmates as a matter of law. Federal courts faced with the issue now, particularly those located in the Sixth, Ninth, and Tenth Circuits (where the Courts of Appeals have not yet spoken on the issue), which may previously have been inclined to follow the precedents of the intervening 27 years, now must contend with the recent ruling in this case and may not dismiss *Lareau* as easily as in the past. The District Court's decision has served to revive and solidify the conflict among federal courts, and the Ninth Circuit has fueled that conflict by refusing to review the District Court's decision and establish the Ninth Circuit law on the issue.

This Court's intervention is therefore necessary to require a ruling from the Ninth Circuit that will

assist not only the Ninth Circuit but also federal courts outside the Ninth Circuit (particularly those in Circuits in which the Court of Appeals has not spoken on the issue) in resolving similar cases involving this important issue. This Court should therefore grant certiorari and order the Ninth Circuit to hear Defendant's interlocutory appeal.

B. The Ninth Circuit's Refusal To Hear The Interlocutory Appeal Assures That The Law On The Issue Will Remain Unsettled Within The Ninth Circuit.

As the District Court acknowledged in its order on summary judgment, the Ninth Circuit has not faced the issue of whether it violates the constitutional rights of inmates to temporarily place them on floor mattresses until a bunk can be found for them. (App. 30.) As a result, district courts faced with the issue have been left to their own devices in ruling on the issue, and forced to guess as to how the Ninth Circuit would rule. This has led to conflicting decisions by District Courts within the Circuit, a trend that is sure to continue in light of the Ninth Circuit's refusal to hear this interlocutory appeal.

The District Court's order granting summary judgment in the instant case is illustrative of the confused analysis public entities can expect from district courts absent guidance from the Ninth Circuit. In light of the absence of such guidance, the District Court relied primarily on *Thompson v. City of Los*

Angeles, 885 F.2d 1439 (9th Cir. 1989) for the proposition that inmate floor sleeping violates the constitutional rights of inmates. In *Thompson*, the Ninth Circuit held that an inmate stated a constitutional claim where he was required to sleep on the floor without a bed or a mattress for two nights. *Id.* at 1448.

The significant distinction between *Thompson* and this case, of course, is in the context. In *Thompson*, it was established that the plaintiff was required "to spend two nights on the floor of a prison cell *without a mattress*." *Id.* at 1442 (emphasis added). This is distinguishable from this case, where it is undisputed that the named Plaintiffs were provided mattresses. The fact that the plaintiff in *Thompson* was deprived of a mattress was essential to the Ninth Circuit's decision. The *Thompson* court applied the reasoning of *Bell v. Wolfish*, *supra*, which requires a court to determine whether a condition of confinement of a pre-trial detainee constitutes "punishment," which can only be determined by looking at the factual circumstances of each individual case. In addition, the authorities the *Thompson* court relied on are primarily cases in which the issue of floor sleeping as a constitutional violation was decided based on the facts and circumstances of each individual case. The Ninth Circuit in *Thompson* therefore looked at the context in which the floor sleeping occurred, precedent the District Court in this case did not follow.

Although the District Court acknowledged that the issue of floor sleeping with a mattress was not addressed in *Thompson*, it nonetheless determined that, if faced with the issue, the Ninth Circuit would view floor sleeping as a *per se* violation of Eighth and Fourteenth Amendment rights based on the *Thompson* court's reliance on *Rutherford v. Pitchess*, 457 F.Supp. 104 (C.D. Cal. 1978), an earlier district court case involving conditions of confinement at the same jail. (App. 29-30.) In its order on summary adjudication, the District Court quoted language from *Rutherford* suggesting that floor sleeping may violate the Eighth Amendment, and held that the *Thompson* court's reliance on *Rutherford* therefore "suggests" that the Ninth Circuit would view floor sleeping as violating the constitution as a matter of law. (App. 30.)

The District Court's reasoning is flawed, however, because the *Thompson* court did not rely on *Rutherford* for the notion that floor sleeping violates the Eighth or Fourteenth Amendment; rather, the *Thompson* court relied on *Rutherford* on the unrelated issue of whether the jail maintains a custom and practice of floor sleeping. *Thompson*, *supra*, 885 F.2d at 1448-49. The fact that the *Thompson* court relied on *Rutherford* on the issue of custom and practice does not mean that the Ninth Circuit would necessarily adopt a sweeping, *per se* rule that floor sleeping always violates the Eighth and Fourteenth Amendments.

The absence of any guidance on this issue from the Ninth Circuit, then, forced the District Court to guess as to how the Ninth Circuit would rule on the issue, and to employ a rather circular form of reasoning to reach the result it did. The Ninth Circuit's refusal to hear the interlocutory appeal assures that such confusion and flawed reasoning by district courts faced with this issue will continue. Indeed, one can imagine another district court faced with the same issue looking to this case and assuming that, because the Ninth Circuit refused to hear Defendant's interlocutory appeal, the Ninth Circuit agrees with the District Court's reasoning. Such potential distortions of the Ninth Circuit's position on the issue is made all the more possible by the Ninth Circuit's refusal to state any grounds for its denial of the interlocutory appeal.

The gap in the law in the Ninth Circuit also permitted the District Court to ignore other cases within the Ninth Circuit involving inmate sleeping conditions that suggest that the Ninth Circuit would decide a case such as this based on its facts. In *Hernandez v. Denton*, 861 F.2d 1421 (9th Cir. 1988), *vacated on other grounds sub nom.*, 493 U.S. 801, 110 S.Ct. 37 (1989), for example, the Ninth Circuit held that depriving an inmate of a mattress for one night was insufficient to state an Eighth Amendment violation. *Id.* at 1424. The *Hernandez* Court sustained the grant of a motion to dismiss the complaint of an inmate-plaintiff, stating: "[a]ppellant's allegation that he slept without a mattress for one

night is insufficient to state an eighth amendment violation and no amendment can alter that insufficiency." *Id.*

As it did in *Thompson*, the Ninth Circuit employed a fact-specific inquiry in deciding *Hernandez* – the fact that the plaintiff was required to sleep without a mattress "for only one night" was essential to the Ninth Circuit's decision in *Hernandez*. *Hernandez* therefore stands for the proposition that, in deciding whether an inmate's sleeping arrangements violate that inmate's constitutional rights, a district court must analyze the context of the sleeping arrangements – something the District Court did not do in this case. The District Court, however, distinguished *Hernandez* on its facts, noting that the *Hernandez* plaintiff "alleged lack of bedding, not the lack of a bed." The District Court's brusque dismissal of *Hernandez* based on a factual distinction is ironic in light of the fact that similar factual distinctions exist in *Thompson*. The gap in the law within the Ninth Circuit, which the Ninth Circuit should have corrected by hearing Defendant's interlocutory appeal, permitted the District Court to make such inconsistent factual distinctions.

Indeed, the lack of guidance from the Ninth Circuit has resulted in conflicting decisions among the district courts in the Ninth Circuit. In *Martin v. Sullivan*, 2007 WL 2462076 (E.D. Cal. 2007), for example, the United States District Court for the Eastern District of California held that a plaintiff did not state an Eighth Amendment violation where he

not only was required to sleep on the floor but was also deprived of medication. *Id.* at *6 ("[p]laintiff alleges that he had to sleep on the steel bunk or the floor and was without his blood pressure medication for three days because it was with his confiscated property. These allegations, alone, are not sufficient to rise to the level of an Eighth Amendment violation."); *see also, Allen v. City and County of Honolulu*, 816 F.Supp. 1501, 1504 (D. Hawaii 1993) ("in Hawaii, there is no constitutional difference between sleeping on a mattress placed on a concrete slab and sleeping on a mattress placed on a concrete floor"); *Ramirez v. City, County of San Francisco*, 1997 WL 33013 (N.D. Cal. 1997) ("The failure to provide inmates with beds or mattresses is actionable under the Eighth Amendment, [citations] however, courts have limited relief to those cases in which inmates have suffered harm from sleeping on the floor.").

The *Ramirez* Court further noted that "[a]lthough it is regrettable that plaintiff had to sleep on a mattress for three days . . . , he presents no evidence that it caused him harm." *Id.* at *8. Relying on the additional testimony that the plaintiff was provided a bunk on all other occasions, the court found that the defendants were entitled to summary judgment on the issue of floor sleeping. *Id.* The Court refrained from establishing a bright line rule such as that imposed by the District Court in this case; instead, it decided the issue based on the unique circumstances of the case. Thus, the other district

courts in the Ninth Circuit appear to be at odds themselves with the District Court's sweeping, *per se* rule.[6]

The rulings of these district courts are in sharp contrast to the ruling of the District Court in this case that requiring an inmate to temporarily sleep on a floor mattress, by itself, violates the inmate's constitutional rights. The federal courts within the Ninth Circuit are clearly in need of guidance on this important issue. This is all the more so in light of the fact that two of the three cases cited above were decided before the District Court in this case rendered its decision. The District Court's ruling may materially affect the way other district courts within the Ninth Circuit will approach this issue.

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[6] The District Court cited *Albano v. Mitchell*, 1998 WL 101743 (N.D. Cal. 1998) for the proposition that a floor sleeping claim "may be sufficient to implicate denial of the minimum civilized measures of life's necessities." (App. 32.) The *Albano* court, however, simply held that a floor sleeping allegation may state a claim; it did not hold that floor sleeping necessarily violates the Eighth or Fourteenth Amendment. In *Albano*, the plaintiff was deprived of a bed and mattress, and required to sleep on the floor of a 4' by 2' shower cell. The same is true with respect to *Loya v. Bd. of County Comm'rs*, 1992 WL 176131 (D. Idaho 1992), which relied on that court's prior holding in *Balla v. Board of Corrections*, 656 F.Supp. 1108, 1118 (D. Idaho 1987) that, "under the circumstances" present at a particular facility, floor sleeping violated the Eighth Amendment. In addition, the District Court relied on *Capps v. Atiyeh*, 495 F.Supp. 802 (D. Or. 1980), which was later vacated by the Ninth Circuit.

Until the Ninth Circuit ultimately decides this issue, the lower federal courts will be left adrift. It was an abuse of discretion for the Ninth Circuit to refuse to hear an interlocutory appeal in light of the District Court's obvious confusion as to the state of the law (and the flawed reasoning that resulted from its confusion), and the Ninth Circuit should be ordered to hear the appeal, as requested by Defendant and the District Court, so as to provide clarity. As discussed below, such clarity would be welcome not only to courts within the Ninth Circuit, but also by federal courts outside the Ninth Circuit.

III. THE DISTRICT COURT'S FLAWED ANALYSIS CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENT AND MUST BE IMMEDIATELY CORRECTED.

Under this Court's holding in *Bell*, *supra*, 441 U.S. at 538-39, a condition of confinement is permissible if it "is reasonably related to a legitimate government objective." *Id.* On the other hand, if a condition "is not related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the government action is punishment that may not constitutionally be inflicted upon detainees." *See id.* If supported by legitimate state objectives, prison officials are permitted to restrict prison conditions as long as minimal levels and quality of basic necessities are provided to inmates. *See Hamm v. DeKalb County*, 774 F.2d 1567, 1573 (11th Cir. 1985).

The Ninth Circuit has noted that the "purpose of punishment" standard set forth by the Supreme Court in *Bell* governs claims by pre-trial detainees. *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002). Indeed, *Bell* involved the same claims by both pre-trial detainees and convicted prisoners and the Supreme Court's rulings were the same as to both groups.

The *Bell* standard has been employed by this Court in other actions involving the Los Angeles County jail system, most notably *Block v. Rutherford*, 468 U.S. 576 (1984). In *Block*, this Court recognized that "[t]he administration of seven separate jail facilities for a metropolitan area of more than seven million people is a task of monumental proportions," given the fact that, at that time, the jail's facilities housed over 200,000 inmates annually. *Id.* at 583. This Court admonished that federal courts should play a "very limited role" in the administration of detention facilities, and cited *Bell* for the proposition that prison officials are to be afforded "'wide-ranging deference in the adoption and execution of policies and practices'" in the jails. *Id.* at 584. These concerns are directly implicated in this case, where the question is the degree of flexibility jail officials are to be afforded in addressing the consistent problem of overcrowding.

In ruling that the Los Angeles County jail is not permitted to temporarily house inmates in cells with floor mattresses in response to overcrowding concerns, the District Court ignored the standard set

forth in *Bell* and the admonition in *Block* that courts must play a limited role in the administration of detention facilities. The District Court afforded Defendant no deference in holding that, barring exigent circumstances caused by a major disaster, Defendant may not temporarily relieve the problem of overcrowding by placing a small number of inmates on floor mattresses until a bunk can be found for them.

The District Court likewise ignored Defendant's evidence that segregation of inmates for security reasons requires temporary floor sleeping because an inmate of one security classification cannot be placed on a bunk in a cell with inmates of another classification, even if a bunk is available. (App. 34-35.) This is clearly a legitimate security concern, within the province of jail administrators to regulate in an appropriate manner. The District Court's response was that the Eighth Amendment requires a bunk, and that no legitimate security (or other) concern may justify the denial of a bunk. This response ignores the standard set by *Bell*, and followed later in *Block*, that a condition of confinement violates the constitutional rights of inmates *only if* it is unrelated to a legitimate government objective; indeed, by deciding that floor sleeping necessarily violates the constitutional rights of inmates before looking at the legitimacy of the asserted government objective, the District Court has turned that standard on its head.

Defendant has asked the Ninth Circuit to correct the District Court's failure to apply the appropriate

legal standard. The Ninth Circuit's refusal to do so (despite the District Court's certification of the appeal) assures that the muddled, ill-defined standard set forth by the District Court will not be subject to review until well after a time-consuming and costly class action trial on damages. This Court's intervention is necessary to assure that the District Court's erroneous application of the law is corrected at the earliest possible time.

IV. THE NINTH CIRCUIT ABUSED ITS DISCRETION IN REFUSING TO HEAR THE INTERLOCUTORY APPEAL.

28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

28 U.S.C. § 1292(b).

Based on the above, certification under section 1292(b) is appropriate where: (1) there is a controlling question of law; (2) the question of law is one for which there are substantial grounds for difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *See, In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd* 459 U.S. 1190 (1983); *U.S. ex rel. Huangyan Import & Export Corp. v. Nature's Farm Products, Inc.*, 370 F.Supp.2d 993, 1005 (N.D. Cal. 2005) (certifying interlocutory appeal where there existed "no on-point precedent from the Ninth Circuit" and the courts deciding the issue were split); *Cisco Systems, Inc. v. California Workers' Compensation Appeals Board*, 2001 WL 34780587 (N.D. Cal. 2001) (granting certification where "the question appears to be one of first impression in [the Ninth] Circuit."); *Lucero v. Regents of University of California*, 1993 WL 341287 (N.D. Cal. 1993) (certifying interlocutory appeal in the absence of controlling Ninth Circuit law).

All of the requirements for certification under section 1292(b) are satisfied in this case. As stated above, the District Court granted certification, acknowledging that all three factors had been satisfied. In summarily denying leave to file the interlocutory appeal, the Ninth Circuit did not even discuss these factors, much less explain why it believed they are not satisfied. It was an abuse of discretion for the Ninth Circuit to refuse to hear an interlocutory appeal on such an important and relevant issue

without so much as a word about the factors favoring the interlocutory appeal.

A. An Interlocutory Appeal Will Determine A Controlling Issue Of Law In The Instant Case.

The District Court's Summary Judgment Order held that inmate floor sleeping constitutes an Eighth Amendment violation as a matter of law. This is the central issue in this case. "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982).

In granting (in part), Plaintiffs' motion for summary judgment, the District Court ruled that floor sleeping, as defined in this Petition, is a *per se* constitutional violation and that examination of the individualized circumstances is unnecessary for this constitutional determination. Clearly, this is a "controlling question of law" since a subsequent finding that the District Court's broad ruling is erroneous would necessarily mandate reversal on appeal after final judgment.

B. Substantial Grounds For Disagreement Exist As To Whether Custodial Floor Sleeping Constitutes A *Per Se* Violation Of Eighth And Fourteenth Amendment Rights.

As set forth in detail above, there are substantial grounds for disagreement as to whether floor sleeping violates the Eighth and Fourteenth Amendment rights of inmates. While the majority of Courts have held that the question cannot be decided as a bright line rule, but instead turns on the facts and circumstances of each individual case, there is a small minority of cases, including the District Court in this case, holding that floor sleeping violates the Eighth and Fourteenth Amendments as a matter of law. The conflict among the federal courts is evidence that there are grounds for disagreement on the issue. If anything, the overwhelming weight of authority supports the position Defendant argued at summary judgment and in this Petition – that floor sleeping does not violate the constitutional rights of inmates absent evidence of additional circumstances. The balance of authority in Defendant's favor is only one more reason, however, why the Ninth Circuit should have granted Defendant leave to file the interlocutory appeal.

C. An Interlocutory Appeal Will Materially Advance The Ultimate Termination Of The Litigation.

For this element to be satisfied, all the Court must find is that "an interlocutory appeal must be likely to materially speed the termination of the litigation." *Hansen v. Schubert*, 459 F.Supp.2d 973, 1000 (E.D. Cal. 2006).

A trial on the damages aspect of this class action case is likely to be burdensome, labor intensive, and complicated. According to Plaintiffs, the class in this matter may consist of at least 25,000 inmates and former inmates of the LACJ system. If the District Court were to proceed with a trial before the question of the constitutionality of floor sleeping is resolved, all of the time, energy, and public resources expended on the trial may be wasted. In addition, even if Defendant ultimately prevails after a trial and appeal, Defendant will most likely be unable to recoup any recoverable costs (which are likely to be very high after a trial), as Plaintiffs are without the significant financial resources that would be required to pay such a cost judgment. The public funds that will be used to pay for the trial will simply be lost. This could be avoided if the Ninth Circuit hears an interlocutory appeal before a trial on damages.

Even if Defendant did not prevail in having the case dismissed in its entirety on a post-trial appeal, the trial may still have to be redone taking into consideration any Ninth Circuit guidelines post

appeal. There is little question that the District Court's order will be subject to appellate scrutiny at some point in time. The only question is whether the appeal is heard now, or after trial. By refusing to entertain Defendant's interlocutory appeal, the Ninth Circuit has temporarily avoided adding an additional case to its docket. However, should the Ninth Circuit's order stand, the parties and the District Court will be put to the time and expense of a trial on damages that will involve extensive (and costly) witness testimony, only to have the judgment appealed and possibly reversed. Thus, while the Ninth Circuit is certain to face this issue at some point, the District Court and the parties may not have to go through the expense of a trial if the Ninth Circuit hears the appeal now.

In addition, an interlocutory reversal of the District Court's grant of summary judgment by the Ninth Circuit would materially affect the class action status of this matter. Should the Ninth Circuit agree with Defendant (and the majority of federal courts that have decided the issue) that the question of floor sleeping as a constitutional violation turns on the facts and circumstances of each individual case, individual fact-determination regarding the circumstances of each class member's floor sleeping claim would be required. Defendant would therefore have grounds to decertify the class. In any event, re-trial would still be required as to the named Plaintiffs.

This potential waste of resources by all parties (including the Court) can be avoided by the grant of this Petition and the immediate review and resolution of

the issues identified herein. The Ninth Circuit did not recognize this factor in denying Defendant's petition for leave to file the interlocutory appeal, warranting review of the Ninth Circuit's order.

V. THIS MATTER IS APPROPRIATE FOR SUMMARY DISPOSITION UNDER RULE 16.

Rule 16.1 of the Rules of the United States Supreme Court permits summary disposition of a petition for writ of certiorari. Defendant respectfully submits that this matter is appropriate for summary reversal. Defendant does not ask this Court to rule on the merits, but only to order the Ninth Circuit to hear an interlocutory appeal on this important issue. Full briefing after a decision on certiorari would therefore be a waste of judicial resources, and unduly time-consuming and expensive to the parties.

CONCLUSION

The petition for writ of certiorari should therefore be granted, and the Ninth Circuit's order denying permission to bring an interlocutory appeal should be summarily reversed.

Respectfully submitted,

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October 2, 2008

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

S. A. THOMAS; et al., Plaintiffs-Respondents, v. LEROY D. BACA, Defendant-Petitioner.	No. 08-80012 D.C. No. CV-04-08448-DDP Central District of California, Los Angeles ORDER (Filed Apr. 16, 2008)

Before: B. FLETCHER and PAEZ, Circuit Judges.

The motion to accept late filing of the opposition to the petition for permission to appeal is granted. The Clerk shall file the opposition received on February 11, 2008.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is denied.

All other motions are denied as moot.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

S.A. THOMAS, Plaintiff, v. LEROY BACA, ~~MICHAEL ANTONOVICH, YVONNE BURKE, DEANE DANA, DON KNABE, GLORIA MOLINA, ZEV YAROSLAVSKY~~, Defendants.	Case No. CV 04-08448 DDP (SHx) **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' RENEWED MOTION FOR SUMMARY ADJUDICATION AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION** [Motions filed on April 3, 2006, and June 28, 2006, respectively] (Filed Sep. 21, 2007)

This matter comes before the Court on Plaintiffs' and Defendant's cross-motions for summary adjudication. After reviewing the papers submitted by the parties and considering the arguments raised therein, the Court grants in part and denies in part Plaintiffs' motion and grants in part and denies in part Defendant's motion, and adopts the following order.

I. PROCEDURAL HISTORY

S.A. Thomas and E.L. Gipson bring this class action under 42 U.S.C. § 1983 against Sheriff Leroy Baca in his official and individual capacities. The class includes pre-trial detainees and post-conviction prisoners who allege that they were required to sleep on the floor of Los Angeles County jail facilities in violation of their constitutional rights. The class is defined as "individuals who, while in Los Angeles Sheriff Department ("LASD") custody, were required to sleep on the floor of a LASD facility with or without bedding." (Order (1) Granting Mot. Class Cert. and (2) Granting Mot. Order Permit Ident. 15, May 17, 2005 ("Class Cert. Order").)[1] The dates of class membership are limited from December 18, 2002, to May 17, 2005. (Order Denying Pls.' Mot. Class Not. 6-7, Dec. 20, 2005.) Individuals forced to sleep on the floor "between December 18, 2000, and December 17, 2002, and who remained in prison until at least December 18, 2002, are also included in the class." (*Id.* 6.)

Plaintiffs move for summary adjudication of three issues: (1) that there is a custom in the Los Angeles County jail system of requiring inmates to sleep overnight on the floor because there are insufficient

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[1] The practice of requiring inmates to sleep on the floor will hereinafter be referred to as "floor-sleeping," as it is the term used by LASD officials and inmates alike. For the same reason, inmates who sleep on the floor will be referred to as "floor sleepers."

available bunks; (2) that the custom is unconstitutional; and (3) that Sheriff Baca is legally responsible for the custom. (Pls.' Mot. for Summ. J. 1-2, May 24, 2006.) Defendant also moves for summary judgment or, in the alternative, summary adjudication. Defendant argues that he is entitled to summary judgment because (1) the conditions of confinement do not give rise to a constitutional violation; and (2) Defendant, in his individual capacity, is entitled to qualified immunity. (Def.'s Mot. for Summ. J. 1-2, June 28, 2006 ("Def. Mot.") 1.) The Court has concluded that Plaintiffs' are entitled to summary adjudication that 1) there was a custom during the class period of requiring inmates to sleep on the floor at LASD facilities, and 2) that the custom violates the Eighth and Fourteenth Amendments to the United State [sic] Constitution. The Court grants summary adjudication to Defendant on the question of qualified immunity.

II. LEGAL STANDARD

A. Summary Adjudication

Summary adjudication of an issue, like summary judgment, is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" on that issue. Fed. R. Civ. P. 56(c). A genuine issue exists if "the evidence is such that a

reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In adjudicating a motion for summary judgment or summary adjudication, the court must draw all reasonable inferences in favor of the nonmoving party. *Id.* at 255.

B. *Monell* Liability under § 1983

Plaintiffs seek summary adjudication of issues related to their official capacity claims against the defendant. Official capacity suits provide "another way of pleading an action against an entity of which an officer is an agent." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978). Therefore, this suit against Sheriff Baca in his official capacity is to be treated as a suit against the County of Los Angeles.

The government as an entity is liable for the deprivation of a plaintiff's constitutional rights under § 1983 when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [constitutional] injury." *Id.* at 694. While a municipal entity may not be held liable through § 1983 under a respondeat superior theory, it may be found liable for a custom or persistent practice. *Id.* at 691, 694.

Here, Plaintiffs seek to establish liability based upon a custom of requiring inmates to sleep on the

floor. A practice that has not received formal approval by an appropriate decision-maker may fairly subject an entity to liability on the theory that the relevant practice is so "permanent and well settled as to constitute a custom or usage with the force of law." *Id.* at 691 (internal quotation marks omitted). Because of the causation requirement implicit in § 1983, Plaintiffs must also establish that the custom is the "moving force" behind their constitutional injuries. *Bd. of the County Comm'rs v. Brown,* 520 U.S. 397, 404 (1997).[2] A custom is the moving force behind a constitutional violation when it is "closely related to the ultimate injury" and when the plaintiff can "establish that the injury would have been avoided had proper policies been implemented." *Long v. County of*

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[2] Defendant contends that, in addition to proving that the custom was the moving force behind their injuries, Plaintiffs must also show that it constitutes deliberate indifference on the part of the government entity in order to establish municipal liability. (Def.'s Mot. 1-2.) Not so. A plaintiff must demonstrate deliberate indifference when it seeks to hold a municipality liable for "failing to prevent a deprivation of federal rights." *Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 291 (1998). Here, by contrast, Plaintiffs argue that an *affirmative* custom exists of requiring pre-trial and post-conviction detainees to sleep on the floor. "Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, . . . [s]ection 1983 itself contains no state-of-mind requirement independent of that necessary to state a violation of the underlying federal right." *Brown,* 520 U.S. at 404-05. Therefore, Plaintiffs need not show deliberate indifference to establish a threshold of potential liability under *Monell.* However, Plaintiffs must nonetheless "establish the state of mind required to prove the underlying violation." *Id.* at 405.

L.A., 442 F.3d 1178, 1190 (9th Cir. 2006) (internal quotation marks omitted).

C. Constitutional Framework

Plaintiffs have asserted causes of action under both the Eighth and Fourteenth Amendments to the United States Constitution. This is because the Plaintiff class includes both pre-trial detainees and post-conviction inmates. Questions about the constitutionality of the conditions of pre-trial detainees "are properly addressed under the due process clause of the Fourteenth Amendment" because such individuals have not yet been convicted of any crime. *Or. Advocacy Center v. Mink,* 322 F.3d 1101, 1120 (9th Cir. 2003); *see Bell v. Wolfish,* 441 U.S. 520 (1979). Questions involving the treatment of post-conviction prisoners are, by contrast, addressed under the Eighth Amendment. *See Farmer v. Brennan,* 511 U.S. 825 (1994). Because "the due process rights of pretrial detainees are 'at least as great as the Eighth Amendment protections available to a convicted prisoner,'" the Ninth Circuit has held that, "even though the pretrial detainees' rights arise under the Due Process Clause, the guarantees of the Eighth Amendment provide a *minimum standard of care* for determining their rights." *Mink,* 322 F.3d at 1120 (quoting *City of Revere v. Mass. Gen. Hosp.,* 463 U.S. 239, 244 (1983)). As will be explained, the Court finds that the custom of floor sleeping in LASD facilities violates the Eighth Amendment. As the constitutional floor, an Eighth Amendment violation necessarily

signifies a Fourteenth Amendment violation. Accordingly, the Court will rely on Eighth Amendment analysis.

The Eighth Amendment "prohibits the infliction of 'cruel and unusual punishments' on those convicted of crimes." *Wilson v. Seiter,* 501 U.S. 294, 297 (1991) (quoting U.S. Const. amend. VIII). The Supreme Court has held that this prohibition extends beyond physically barbarous punishments. *Estelle v. Gamble,* 429 U.S. 97, 102 (1976). Because the Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity and decency,'" it proscribes punishments that are "incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958)).

Establishing a violation has both an objective and a subjective prong. The objective prong requires that the "deprivation [be] sufficiently serious," because "only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson,* 501 U.S. at 298 (internal quotation marks and citation omitted). Such necessities include "adequate shelter, food, clothing, sanitation, medical care, and personal safety." *Johnson v. Lewis,* 217 F.3d 726, 731 (9th Cir. 2000) (citing *Farmer v. Brennan,* 511 U.S. 825, 832 (1994)).

Under the subjective prong, Plaintiffs must show that "the prison officials had a 'sufficiently culpable

state of mind,' acting with deliberate indifference." *Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005) (quoting *Farmer*, 511 U.S. at 834). "'Deliberate indifference entails something more than mere negligence but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.'" *Id.* (quoting *Farmer*, 511 U.S. at 834) (internal alterations omitted).[3]

III. DISCUSSION

A. Evidentiary Issues

Before reaching the merits of Plaintiffs' constitutional claims, several evidentiary matters must be addressed. In support of their motion for summary judgment, Plaintiffs offer: (1) deposition transcripts of LASD officials; (2) an August 30, 2005 letter to an inmate signed by Captain Timothy C. Cornell; (3) a summary exhibit listing inmates who have provided information to Plaintiffs' counsel concerning their own floor-sleeping; (4) a summary exhibit listing floor sleepers from records provided to Plaintiffs by Defendant pursuant to this Court's orders; (5) Plaintiff Thomas's declaration; (6) declarations of inmates who

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[3] The deliberate indifference standard does not "govern[] the due process rights" of pretrial detainees; instead, analyzing Due Process claims requires courts to balance the interests of the detainees against the "legitimate interests of the state." *Mink*, 322 F.3d at 1120-21.

claim they were forced to sleep on the floor while in LASD custody; (7) newspaper articles regarding floor-sleeping in LASD facilities; and (8) records produced by Defendant detailing 688 additional instances of floor sleeping in February 2006. Defendant also offers the following evidence in support of its motion and in opposition to Plaintiffs' motion: (1) the Commitment Order in the criminal matter against Plaintiff Thomas issued May 17, 2005; and (2) a declaration of Captain John H. Clark. Both parties have also submitted excerpts of the depositions of Plaintiffs Thomas and Gipson, which have been lodged with the Court.

1. Information Provided by Captain John H. Clark

Captain Clark has stated both that floor-sleeping was a daily occurrence, and that on some days no inmate slept on the floor. This contradictory recollection raises the question of whether a genuine issue of material fact has been created about the existence of daily floor-sleeping, which could preclude summary adjudication.

After reviewing his various testimony, The Court finds that Captain Clark's inconsistent statements do not create a genuine issue of material fact.

In his deposition, Captain Clark stated that Men's Central Jail ("MCJ") has floor sleepers. (Clark Dep. 19:6-11, March 11, 2005.) He testified that the number of floor sleepers varies "depending on the

population as it moves in and out of our jail," but agreed that "from late August – very late August 2004 to date [ ] the number of floor sleepers *on any given day* ranges between 35 and 500." (*Id.* at 19:17-19; 20:20-24) emphasis added).) However, in a subsequent declaration attached to Defendant's opposition to Plaintiffs' motion for summary adjudication, Captain Clark states:

> [T]here are days when ***all*** inmates are afforded a bunk upon which to sleep. On those occasions when some inmates are not afforded a bunk, there are typically between zero and 300 such inmates."

(Clark Decl. ¶ 4 (emphasis in original).)

"[A]n affidavit submitted in response to a motion for summary judgment which contradicts earlier sworn testimony without explanation of the difference does not automatically create a genuine issue of material fact." *Scamihorn v. Gen. Truck Drivers,* 282 F.3d 1078, 1086 n.7 (9th Cir. 2002). While "minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit,", a "sham" contradiction will not preclude summary judgment. *Id.* (internal quotation marks omitted).

The Court finds that Captain Clark's statement in his declaration that on some days there are no floor sleepers in MCJ is a "sham" contradiction, in that it is an attempt to avoid summary judgment by creating an issue of fact rather than to clarify his testimony. In

his deposition, Captain Clark stated that counts of floor sleepers are taken each day at MCJ and that the lowest number of floor sleepers he could recall on any such daily count was thirty five. Captain Clark's declaration does not clarify this statement, but rather "flatly contradicts" it. *See Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991). The Court does find, however, that the portions of Captain Clark's declaration in which he discusses the population at MCJ and the reason for floor-sleeping clarify and supplement his prior deposition. Accordingly, while those statements will be considered, the Court will disregard Captain Clark's statements that on some days during the relevant period there were no floor sleepers.

2. Summary of Floor Sleepers Compiled by Plaintiffs' Counsel from Records Provided by Defendant

On May 17, 2005, the Court certified the class in this case and ordered Defendant to "maintain records that identify by full name and booking number each person who was required to sleep on a floor, with or without bedding. The record for each person shall also include the date, time and location for each occurrence." (Class Cert. Order 15.) On July 1, 2005, the Court ordered Defendant to produce to Plaintiffs copies of any and all records that it had maintained in compliance with the May 17 Order and to supplement the production at regular intervals. (*See* Prod. Order, July 1, 2005.)

From those records, Plaintiffs' counsel compiled summaries of floor sleepers in six LASD facilities during the period May 29, 2005, to September 29, 2005 ("Floor Sleeper Summaries").[4] The first summary lists 24,688 instances where individuals were required to sleep on the floor.[5] The second summary lists 5,181 individuals who were required to sleep on the floor for more than one night. (*See* Pls.' Addit. Evidence.)

The majority of the inmates slept on the floor for between two and seven nights. For example, 2,523 individuals slept on the floor twice, 1,148 individuals slept on the floor three times, and 668 slept on the floor four times. (*Id.*) The incidence of floor-sleeping varies widely among the jail facilities. At the February 6, 2006 hearing on this motion, the Court ordered Defendant to file notice of any objections to the summaries. Defendant Baca has raised several objections

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[4] On January 31, 2006, Plaintiffs submitted the full records that Defendant produced in response to the Court's May 17 and July 1 Orders. (*See* Floor Sleeper Summaries.) On February 9, 2006 and March 2, 2006, Plaintiffs submitted a summary of those individuals required to sleep on the floor for more than one night. (*see* Pls.' Tabulations of Repeat Floor Sleepers; Pls.' Addit. Evidence.)

[5] Plaintiffs' initial summary listed 24,713 instances of floor sleeping. (*See* Floor Sleeper Summaries.) On March 2, 2006, Plaintiffs filed a corrected summary of repeat floor sleepers. Plaintiffs reduced the number of repeat floor sleepers by twenty-five, accordingly, the number of instances of floor sleeping considered by the Court is reduced by twenty-five.

to these summaries, and the Court addresses them in turn.

i. Factual Objections

Defendant objects that the summary of repeat floor sleepers contains misspelled names and inaccurate booking numbers. (Def.'s Object. Floor Sleepers 6-7.) These are minor errors that do not impact the overall accuracy of the material. Defendant also argues that the summary contains an unspecified number of repeat entries and that one entry incorrectly indicates that an inmate spent twenty-six nights rather than two nights on the floor. (*Id.*) Plaintiffs' counsel concedes that the actual number of repeat floor sleepers is 5,181 and not 5,206 as originally calculated. (Pls.' Reply to Def.'s Object. 7-9.) Further, Plaintiffs' counsel concedes that one entry incorrectly listed an inmate sleeping on the floor twenty six times. (*Id.* at 5-6.) Plaintiffs' counsel has submitted a corrected summary that does not contain any substantive inaccuracies.

ii. Rule 1006 Objection to Summary Exhibit

Defendant argues that the summaries fail to satisfy the requirements of Federal Rule of Evidence 1006, which precludes the use of summaries when the underlying records (1) are not too voluminous to be conveniently examined in court; (2) are inadmissible; or (3) were not made available to the opposing party

for inspection. *See Amarel v. Connell,* 102 F.3d 1494, 1516 (9th Cir. 1996). This contention is without merit.

First, the Court finds that the underlying records of thousands of instances of floor-sleeping over the course of four months in multiple LASD jail facilities are too voluminous to be conveniently examined.

Second, the underlying records upon which the summary exhibit is based are admissible in evidence. Defendant objects that the underlying records are inadmissible hearsay under Federal Rules of Evidence 803 and 804. (Def.'s Obj. Floor-Sleepers at 5.) However, the underlying records were prepared by Defendant and disclosed to Plaintiffs pursuant to the Court's order. (*See* Class Cert. Order 15.) As statements made by and offered against Defendant, the underlying records are not hearsay. *See* Fed. R. Evid. 801(d)(2) (providing that a statement is not hearsay if it is offered against a party and is "(C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship"). Accordingly, the objection is overruled.

Defendant further objects that the records of floor sleepers between May 28, 2005 and September 29, 2005 are inadmissible as irrelevant because class membership dates from December 18, 2002 to May 17, 2005 – prior to the records in question. (Def.'s Obj.

Floor-Sleepers 2; *see also* Order Denying Pls.' Mot. Class Notif.)

Although the incidents of floor-sleeping referred to in the summary exhibit occurred after the class period closed, "'post-event evidence' may be used to prove the existence of a municipal policy in effect at the time" of the alleged constitutional violation, and indeed "may be highly probative with respect to that inquiry." *Henry v. County of Shasta,* 132 F.3d 512, 519 (9th Cir. 1997), *as amended on denial of rehearing,* 137 F.3d 1372 (9th Cir. 1998). In the instant case, evidence that over 24,000 instances of floor-sleeping occurred in the four month period immediately following the close of the class is "highly probative" as to the likelihood that the practice was similarly in place during the class period.

Third and finally, Defendant's objection that the underlying materials were not made available to Defendant is overruled because the underlying materials belong to Defendant. Accordingly, the Court finds that the summary exhibit satisfies Federal Rule of Evidence 1006.

3. Declaration of Plaintiff Thomas

Defendant objects to a number of paragraphs within Plaintiff Thomas's Declaration of August 28, 2006. (*See* Decls. and Exs. in Opp. to Mot. Sept. 11, 2006 ("Decls. & Exs."), Thomas Decl. 4-7.) Defendant objects to each paragraph, except the first, on the grounds that it either lacks foundation, is inadmissible

hearsay, is vague and ambiguous, or irrelevant. (Def.'s Obj., Oct. 6, 2006, 6-8.) These objections are overruled. Defendant further objects to paragraphs 25 through 31 on the grounds that they concern an incarceration that is not alleged in the operative pleading and is therefore irrelevant. (*Id.*).

As alleged in the Third Amended Complaint ("TAC"), during the relevant period Thomas was incarcerated once, from May 17, 2004 to June 23, 2004. (TAC ¶ 15.) Defendant contends that Thomas was a post-conviction prisoner, rather than a pretrial detainee during that incarceration. (Def.'s Mot. at 6.) Thomas concedes he was a post-conviction prisoner during that period. (Thomas Dep. 11-22.) However, he also raises for the first time a previous occasion during which he was forced to sleep on the floor of a LASD facility while he was a pre-trial detainee in March of 2003. (*See* Pls.' Stmt. of Genuine Issues 2 ("Plaintiff Thomas also previously was incarcerated at the LASD Jail in March 2003 as a pretrial detainee. . . . ").) The Court finds that Plaintiff Thomas's reference to his 2003 detention is irrelevant because it was not alleged in the operative pleadings.

As such, the Court grants Defendant's motion to strike paragraphs 25 through 31 of Plaintiff Thomas's declaration and considers Plaintiff Thomas to have been a post-conviction inmate at all times relevant to the instant case.

4. Declarations of Inmates Regarding Floor Sleeping

i. 1,150 Declarations of Floor Sleepers

Plaintiffs submitted 1,150 declarations of persons who alleged they were forced to sleep on the floor of various LASD facilities. (Evid. in Support of Pls.' Mot., April 3, 2006.) Defendant objects to a number of declarations.

a. Irrelevancy

Defendant objects to 56 declarations as irrelevant because they contain allegations unrelated to floor-sleeping. In fact, the majority of these declarations describe in detail the conditions in which the declarants were required to sleep on the floor. To the extent that the declarations describe general conditions of confinement that existed in combination with floor-sleeping – such as the existence of staphylococcus infections, overflowing toilets, vermin infestations, overcrowded cells, violent fights over which inmate would receive a bunk, etc. – those allegations are admissible. *See Wilson,* 501 U.S. at 304 (noting that the totality of the conditions of confinement may in combination establish a constitutional violation "when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need"). To the extent, however, that a number of declarations include allegations unrelated to floor-sleeping, such as denial of medical care, retaliation by jail officials, and food poisoning, to name a few, such

allegations are not relevant to the instant case and are not admissible.

b. Vague and Ambiguous

Defendant objects to 87 declarations on the grounds that they are impermissibly vague and ambiguous because "[t]he declarants cannot identify the specific dates or lengths of time for which they purportedly slept on the floor." (Def.'s Obj. 8-11, April 27, 2006.) Whether these declarants remember the exact dates they slept on the floor is immaterial to the declarations' admissibility. The allegation that an inmate slept on the floor of an LASD facility, even without mention of the dates and length of time, is probative on the existence of a custom of floor sleeping.

c. No Allegation of Floor Sleeping in LASD Facilities

Upon the objection of Defendant, the Court strikes the declarations of Stephen Razo, Edward Reed, Ricky Saldenas, and Lawrence Johnson because they do not state that the declarant was required to sleep on the floor or do not allege floor-sleeping in an LASD facility. Insofar as these declarations are admitted to establish the existence of a custom of floor-sleeping, the Court will only consider the declarations to which Defendant has not specifically objected. The 74 declarations that allege physical injuries or harm that resulted from floor-sleeping

are not admissible to prove that the declarants' injuries were caused by floor-sleeping. However, they are admissible to show that certain illnesses, staphylococcus infections in particular, occur within the Los Angeles County jail system.

B. Existence of a Custom of Floor Sleeping

Plaintiffs contend that their evidence establishes that no reasonable jury could find that a custom of floor did not exist in the Los Angeles County jail system during the class period.[6] The Court agrees.

A custom is a "longstanding practice . . . which constitutes the standard operating procedure of the local government entity." *Menotti v. City of Seattle,* 409 F.3d 1113, 1151 (9th Cir. 2005) (internal citation omitted). "Isolated or sporadic incidents" are insufficient to establish liability; an "improper custom . . . [must be] founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Id.; cf. Meehan v. County of Los Angeles,* 856 F.2d 102,

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[6] Indeed, Plaintiffs urge the Court to apply a presumption that a custom of floor-sleeping exists. In *Thompson v. City of Los Angeles,* 885 F.2d 1439 (9th Cir. 1989), the Ninth Circuit applied a presumption that there was a custom of floor-sleeping in the Los Angeles County jail system because such a custom had been found to exist just seven years earlier in *Rutherford v. Pitchess,* 457 F. Supp. 104 (C.D. Cal. 1978). At present, however, because nearly eighteen years have elapsed since *Thompson*, the Court will not presume that a custom of floor-sleeping persists.

107 (9th Cir. 1988) (two incidents are not sufficient to establish a custom).

Plaintiffs have presented evidence that, according to Defendant's own records, over 24,000 instances of floor sleeping throughout the Los Angeles County jail system occurred in just a four month period. (Pls.' Add'l. Evid. 2-3, Jan. 17, 2006.) In addition, 885 individuals submitted declarations that documented their floor sleeping ordeals at LASD facilities. According to the deposition of Captain Clark, on any given day in Men's Central Jail alone there are anywhere from thirty five to 500 floor sleepers. (Clark Dep. 20:6-12, March 11, 2005). Other LASD officials saw inmates lying on the floor of the Inmate Reception Center ("IRC") between April 2004 and January 2005, (Decls. and Exs., Ex. 10, Yim Decl. 12:10-13:10), and explained that if an inmate admitted to the IRC does not complete processing by nighttime, he is not moved to a bunk until he is permanently housed unless he has medical or mental health issues, (*id.* Ex. 11 at 143, Klugman Dep. 32:15-23). A different LASD official, Captain Cornell, confirmed in a letter that floor-sleeping is "a necessary result of temporary insufficient bed space to accommodate every inmate." (Pls. Add'l Brief. on Mot., Ex. 2, March 6, 2006.)

The class representatives provide vivid examples of when and how floor-sleeping occurs in LASD facilities:

Plaintiff E.L. Gipson was a pre-trial detainee while in LASD custody and therefore represents class

members who were pre-trial detainees when they were forced to sleep on the floor. Plaintiff Gipson has, at various times, been in custody at several LASD jail facilities, including the Twin Towers Correctional Facility, Men's Central Jail, and the Pitchess Detention Center. Gipson's deposition reveals that from the moment he was admitted to Twin Towers in 2004, he was forced to sleep on the floor.

While being processed, Gipson was held in a holding cell with approximately 200 other inmates for approximately forty-eight hours. (Gipson Dep. vol. I, 77:15-78:79.) Within the holding cell, there were twenty benches, each of which could seat ten people, but no place to sleep. (*Id.* 78:10-16.) As a result, Gipson and the other inmates were forced to lie down on the floor to sleep. (*Id.* 80:18.) After spending forty-eight hours in that holding cell, Plaintiff Gipson stated that he was moved to a second cell, "maybe 10 by 20, . . . [where there were] people laying down like snakes huddled all up together trying to get rest because they're tired from being up for 48 hours or whatever." (*Id.* 82:14-22.)

Plaintiff Gipson explained that after spending several hours in that cell, he was taken to a third, virtually identical cell where he was held for twenty-four to forty-eight hours, again without a bunk. (*Id.* 84:2-23.) Once Gipson was eventually moved to a module, he was assigned to a day room without a bunk on which to sleep. (*Id.* 85:24-87:3.) When he arrived, the only available place for him to place his mattress was on the floor directly under the staircase.

(*Id.* 87:4-9.) On yet another occasion, Gipson was required to sleep on the floor of a shower, where he was held along with sixty other inmates, none of whom were provided bunks or a bed. (*Id.* vol. 2, 177:25-179:16.)

During another incarceration in 2004 at Men's Central Jail, Gipson again was not provided a bunk and was forced to sleep on the floor. (*Id.* vol. I 112:1, 9-11.) He was placed in a six-man cell that was already filled to capacity when he arrived, such that he had no choice but to sleep on the floor. He described the cell as follows:

> THE WITNESS: Okay. The cell is about 6 feet by 12 feet, I guess, or 8 feet by 12. It has six bunks and a toilet. And I had to sleep on the floor in that cell on a wet mattress that was by the toilet.

(*Id.* 111:12-25.)

The following excerpt from Plaintiff Gipson's deposition provides one of the most illuminating descriptions of the conditions in which inmates are forced to sleep on the floor:

> [Plaintiffs' Counsel]: What conditions [in the jail] are you talking about?
>
> . . . .
>
> THE WITNESS: Okay. Five days of processing, . . . just sitting on benches until you fall off into – you're just so tired, you lay on the floor and you just wait and wait and

wait. And you're laying down with – packed on the floor, cement, cold, with no blanket, nothing . . . and it's just 40 men in a 10-man day tank.

[Plaintiffs' Counsel]: What about at night?

THE WITNESS: It didn't matter if it was – you didn't know if it was day or night. It just didn't matter. You were just there until you fall out. And you have to rest. So you end up on the floor with 30 other guys . . . until you said you're not going to lay down on the floor, but you just don't have a choice. You know, that breaks you. It makes you feel bad.

Q. How does that in particular make you feel bad?

A. Because, after that, you finally get processing [sic] and they send you to a dirty, nasty cell, a six-man cell or a five-man cell, and you're the sixth man, and you got to sleep under a bunk.

And you think about hurting somebody. You think about – you're bigger than that guy that's got a bunk, and you want to take him off the bunk and smash him down and take his bunk, but, you know, why you have to do this? Why should I have to go through that? You think about that, and it just tears you up inside.

And then you sleep on the floor and your back hurts and you're in pain . . . You can't

> do nothing. You feel like you're just in a bad nightmare, like a – you know, they used to talk about prisons in other countries, but that's right here in Los Angeles County jail, the same conditions.

(*Id.* 52:19-54:12.)[7]

Plaintiff S.A. Thomas was a post-conviction inmate while in LASD custody and thus represents post-conviction inmates required to sleep on the floor. Plaintiff Thomas was also forced to sleep on the floor. In his declaration, Thomas described the following:

> 13. The day room was very crowded, and there was only about ten inches between my mattress and the mattress of another inmate.
>
> 14. The only place I could find to sleep was under a stairway leading up to a second tier which housed suicidal inmates.

(Decls. and Exs., Thomas Decl. 3:13-18.)[8]

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[7] Although cleanliness and sanitation are not the focus of the instant inquiry, the Court notes that Gipson reported seeing vermin and roaches on a daily basis, (Gipson Dep. vol. I, 127:12-23), that the bedding he did receive was wet, (*id.* 113:9-10), and that he was forced to sleep in "molded and mildewed" rooms, (*id.* vol. 2, 177:25-179:16). He also developed a staphylococcus infection on his left heel during his ordeal that required hospitalization; Gipson believed he contracted the infection from the standing water on the floor of the cell in the area he was required to sleep. (*id.* vol. I, 114:18-118:25)

[8] Like Gipson, Thomas reported unsanitary conditions suffered by floor sleepers; he also developed chronic back and

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Defendant acknowledges that floor sleeping occurred during the relevant period, but stresses that the vast majority of inmates have a bunk on which to sleep. (Def. Opp. to Mot. at 9.) Defendant Baca argues that if MCJ housed 5,400 inmates on a given day, and 300 slept on the floor, 94.4% of inmates would receive a bunk on which to sleep. (*Id.* 11) Therefore, Baca contends that "[w]hen the uncontroverted evidence demonstrates that a full 94.4% of inmates at Men's Central Jail sleep on a bunk in the worst-case scenario, it would be improper to issue a ruling that suggests all inmates sleep on the floor." (*Id.* 14.)

The Court is not persuaded. Plaintiffs are not asking for a ruling that "all inmates sleep on the floor," nor does the law require such a showing in order to establish the existence of a custom. Plaintiffs have submitted sufficient evidence, based in important part on Defendant's own records, to prove that it is the "'standard operating procedure' of the local government entity" to require inmates to sleep on the floor when there are insufficient bunks available, and that, over the period of relevant time, multiple inmates were denied bunks on a daily basis. *Menotti,* 409 F.3d at 1151. That the majority of inmates receive a bunk on which to sleep does nothing to rebut the consistency with which many inmates are forced to sleep on the floor, a practice that occurred as

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shoulder pain during the period when he was forced to sleep on the floor. (Thomas Dep. 49:29, 52:9-15.)

frequently as 24,000 times over the course of just four months. *See Thompson,* 885 F.2d at 1448-49 (holding that there was a rebuttable presumption of floor sleeping in LASD facilities because seven years earlier "the county jail was *often* not providing each inmate with a bed" (emphasis added)); *Anela v. City of Wildwood,* 790 F.2d 1063, 1069 (3d Cir. 1986) (holding that city defendant could be held liable for custom of unconstitutional prison conditions, including floor-sleeping, where the evidence "revealed a longstanding condition that had become an acceptable standard and practice," and where the city "offered no evidence rebutting the absence of beds or mattresses"). Drawing all inferences in favor of Defendant Baca, the Court finds that no reasonable jury could find that a custom of floor-sleeping did not exist in the Los Angeles County jail system during the class period. *See Anderson,* 477 U.S. at 248. Accordingly, the Court grants Plaintiffs' motion for summary adjudication on the existence of a custom of floor-sleeping.

C. Constitutionality of Floor-Sleeping at LASD Facilities

Plaintiffs seek summary adjudication of whether this custom of floor sleeping is unconstitutional. (*See* TAC ¶ 25; Reply 22.) The Court finds that the practice of requiring inmates to sleep on the floor of LASD jails violates the Eighth Amendment.

1. Objective Prong – Floor Sleeping is Sufficiently Serious

The Court finds that Defendant's custom of floor-sleeping is, objectively, a sufficiently serious deprivation of "the minimal civilized measure of life's necessities" to warrant protection by the Eighth Amendment. *Wilson,* 501 U.S. at 298 (internal quotation marks omitted). With this conclusion the Court must, unfortunately, join in nearly thirty years of judicial recognition and condemnation of the practice in LASD facilities.

Judge William Gray first identified floor-sleeping at LASD facilities as unconstitutional in 1978. *See Rutherford v. Pitchess,* 457 F. Supp. 104 (C.D. Cal. 1978), *aff'd in part and rev'd in part on other grounds,* 710 F.2d 572 (9th Cir. 1983), *rev'd sub nom., Block v. Rutherford,* 468 U.S. 576 (1984)). In that case, a class of pre-trial detainees and post-conviction inmates challenged various conditions of confinement at Los Angeles County Central Jail, including the practice of floor-sleeping. The court concluded that it was "intolerable" that some inmates were "obliged to sleep on mattresses on the concrete floor of the cell or of the walkway that fronts a row of cells." *Id.* at 109. He explained that "[i]f the public . . . finds it necessary to incarcerate a person, basic concepts of decency, as well as reasonable respect for constitutional

rights, require that he be provided a bed." *Id.* (internal quotation marks omitted).[9]

Eleven years later, the Ninth Circuit confirmed that floor-sleeping in LASD facilities could violate the Constitution. *See Thompson v. City of Los Angeles,* 885 F.2d 1439 (9th Cir. 1989). In that case, the court, relying on the findings in *Rutherford,* reversed the district court's grant of summary judgment in favor of the defendant, holding that the plaintiff's "uncontroverted allegation that he was provided with neither a bed nor even a mattress unquestionably constitutes a cognizable" constitutional claim."[10] *Id.* at 1448.

Defendant Baca argues that *Thompson* is distinguishable because Plaintiffs here were generally afforded mattresses. The Court cannot agree. Nothing

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[9] The court did not expressly indicate whether its ruling hinged upon the Eighth or the Fourteenth Amendment. *See Rutherford,* 457 F. Supp. at 108 (quoting Supreme Court cases about both Amendments). However, the court's reliance on the Eighth Amendment "evolving standards of decency" language, as well [sic] its recognition that the class included post-conviction inmates – the conditions of whom are governed by the Eighth Amendment – suggests that its conclusion was at least in large part rooted in Eighth Amendment analysis. *See id.* (quoting language regarding the Eighth Amendment from *Trop v. Dulles,* 356 U.S. 86, 100 (1958)).

[10] Because that case dealt with a pre-trial detainee plaintiff, the court used Fourteenth Amendment, rather than Eighth Amendment, analysis. *Thompson,* 885 F.2d at 1448. However, its reliance on *Rutherford* indicates that it may have questioned the constitutionality of the practice under the Eighth Amendment as well.

in the Ninth Circuit's reasoning hinged on the lack of a mattress, rather than the lack of a bunk. To the contrary, the court emphasized cases holding that "a jail's failure to provide detainees with a mattress *and* bed or bunk runs afoul of the commands of the Fourteenth Amendment." *Id.* (emphasis added) (citations omitted). The issue of whether floor-sleeping *with mattresses* is unconstitutional was not before the court in *Thompson*. Nevertheless, its reliance on *Rutherford* – which held unconstitutional the practice of forcing inmates to sleep *on a mattress* on the floor – suggests that the Ninth Circuit views floor-sleeping, with or without a mattress, as offending "basic concepts of decency, as well as reasonable respect for constitutional rights," *id.*, language that directly implicates the Eighth Amendment.

Following in the footsteps of this jurisprudence, the Court finds that requiring inmates to sleep on the floor deprives them of a minimum measure of civilized treatment and access to life's necessities because access to a bed is an integral part of the "adequate shelter" mandated by the Eighth Amendment. *Johnson*, 217 F.3d at 731. The "routine discomfort inherent in the prison setting" may not state a constitutional claim, *id.*, but depriving inmates of beds goes deeper. The Constitution clearly does not allow prisoners to suffer the deprivation of adequate food or water. *See id.* at 730 (identifying a cognizable constitutional violation when inmates alleged they were, *inter alia*, given "spoil[ed]" food and limited water for several days). Just so, prisons may not deprive those in their

care of a basic place to sleep – a bed; for like wearing clothing, sleeping in a bed identifies our common humanity.

That many individuals, for cultural or health reasons, *choose* to sleep on the floor in no way detracts from this point. A predilection for camping under the stars or the soothing touch a hard futon may have on a sore back is entirely different in kind from stripping an individual of the option of using a bed. Quite simply, that a custom of leaving inmates nowhere to sleep but the floor constitutes cruel and unusual punishment is nothing short of self-evident.

The Court is not alone in finding that a minimum degree of civilized conduct *demands* such a conclusion. In *Lareau v. Manson,* 651 F.2d 96, 107-08 (2d Cir. 1981) (emphasis added), for example, the Second Circuit affirmed the district court's ruling that "forcing men to sleep *on mattresses* on the floors" violates the Eighth Amendment because it does "not provide minimum decent housing *under any circumstances for any period of time.*" Similarly, the Third Circuit, in holding that a county's remedial plan to improve conditions in its jail would satisfy Eighth and Fourteenth Amendment requirements of adequate shelter if, *inter alia,* it provided inmates with "bunk-type beds of their own," characterized forced floor-sleeping, even with mattresses, as an "unsanitary and humiliating practice." *Union County Jail Inmates v. Di Buono,* 713 F.2d 984, 996, 1001 (3d Cir. 1983); *see also Lyons v. Powell,* 838 F.2d 28, 30 (1st Cir. 1988) (holding that floor-sleeping with mattress stated

cognizable Fourteenth Amendment violation); *Anela*, 790 F.2d at 1069 (same, in light of *Lareau* and *Union County*); *Albano v. Mitchell*, No. C 97-3781, 1998 WL 101743, at *1 (N.D. Cal. Feb. 24, 1998) (unpublished) (noting that allegations of floor-sleeping "may be sufficient to implicate denial of the minimum civilized measures of life's necessities"); *Loya v. Bd. of County Comm'rs*, No. CV 91-216, 1992 WL 176131, at *2 (D. Idaho May 4, 1992) (unpublished) (noting its own previous holding that "sleeping on the floor is constitutionally prohibited"); *Balla v. Bd. of Corr.*, 656 F. Supp. 1108, 1114 (D. Idaho 1987) (enjoining floor-sleeping and characterizing it as "dehumanizing, intolerable and certainly of no penological benefit"); *Capps v. Atiyeh*, 495 F. Supp. 802 (D. Or. 1980) (holding that overcrowded conditions which led to practices including floor-sleeping violated the Eighth Amendment); *Stewart v. Gates*, 450 F. Supp. 583, 588 (C.D. Cal. 1978) (holding floor-sleeping unconstitutional).[11]

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[11] The Court is not persuaded by the decisions Defendant cites from other circuits summarily holding that floor-sleeping does not state a constitutional violation. *See, e.g., Mann v. Smith*, 796 F.2d 79, 85 (5th Cir. 1986) (holding claim that floor-sleeping is unconstitutional was "meritless" because "Mann has cited no case holding that the Constitution requires elevated beds for prisoners, and we know of no source for such a right."); *Hamm v. DeKalb County*, 774 F.2d 1567, 1575 (11th Cir. 1985) (upholding grant of summary judgment for the defendant without considering the detailed facts of the floor sleeping).

The basic humanity inherent in providing access to a bed highlights the practice of forced floor-sleeping as one of the unconstitutional effects of prison overcrowding. While "[o]vercrowding itself is not a violation of the Eighth Amendment[, i]t can, under certain circumstances, result in specific effects which can form the basis for an Eighth Amendment violation." *Hoptowit v. Ray*, 682 F.2d 1237, 1248-49 (9th Cir. 1982). This makes sense. Overcrowding is not itself the constitutional harm; it is merely the *reason* behind the harm. As the Ninth Circuit has emphasized, overcrowding "may dilute other constitutionally required services such that they fall below the minimum Eighth Amendment standards, and it may reach a level at which the shelter of the inmates is unfit for human habitation." *Id.* Forcing inmates to sleep on the floor stoops to that unconstitutional level.[12]

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[12] For this reason, the Court does not subscribe to an interpretation of the Eighth Amendment that protects only inmates who have suffered some external, physical harm as a result of the floor-sleeping. *See, e.g., Ramirez v. City and County of San Francisco*, No. C 89-4528, 1997 WL 33013, at *7 (N.D. Cal. Jan. 23, 1997) (concluding that "courts limit relief to those cases in which inmates have suffered harm from sleeping on the floor"). It is the degradation inherent in the forced floor-sleeping itself that is the harm. *See Thompson*, 885 F.2d at 1448 (holding floor-sleeping to present a cognizable constitutional claim without mention of any external harm). Nevertheless, the Court cannot help but note that Plaintiffs in this case *have* presented evidence that they suffered significant external harm from the filthy conditions in which they were forced to sleep on the floor, including back pain requiring medical treatment, coughing from

(Continued on following page)

International guidelines support this basic right. *See, e.g., Roper v. Simmons,* 543 U.S. 551, 578 (2005) (considering "international opinion" in Eighth Amendment analysis); *Atkins v. Virginia,* 536 U.S. 304 (2002) (same). For example, the United Nations Standard Minimum Rules for the Treatment of Prisoners, which contain guidelines regarding confinement conditions and set forth minimum acceptable prison conditions, provide that "[e]very prisoner shall, in accordance with local or national standards, *be provided with a separate bed,* and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness." *United Nations Standard Minimum Rules for Treatment of Prisoners,* E.S.C. Res. 663 C (XXIV), U.N. ESCOR, 24th Sess., Supp. No. 1, ¶ 19, U.N. Doc. E/3048 (1957) (amended 1977) (emphasis added); *see Lareau,* 651 F.2d at 106 (relying on these standards in assessing the meaning of "adequate shelter" and holding floor-sleeping unconstitutional).

Defendant asks the Court to excuse the existence of floor-sleeping because of the need to segregate prisoners for security reasons. (Def.'s Opp'n 9.) According to Defendant, because "an inmate of one classification cannot be indiscriminately placed with inmates of other classifications," certain individuals

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the dust and grime, staphylococcus infections, exposure to leaking sewage, and exposure to cockroaches and vermin. (Gipson Dep. 115:18-116:7, 121:7, 128:6-22.)

may be required to sleep on the floor even if a bunk is available with inmates of another classification. (Clark Decl. ¶ 9.) In other words, Defendant contends that the need to classify a large inmate population causes, and thereby justifies floor-sleeping. The Court disagrees.

Prisons have a legitimate interest in "maintain[ing] security and order at the institution," and they may impose restrictions that are reasonably related to that interest. *Bell v. Wolfish,* 441 U.S. 520, 540 (1979). However, as explained, access to a bed is a fundamental human necessity under the Eighth Amendment. A restriction that violates that constitutional floor cannot possibly be reasonable. *See Johnson v. California,* 543 U.S. 499, 511 (2005) (noting that "the integrity of the criminal justice system depends on full compliance with the Eighth Amendment" and that "[m]echanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary" (internal quotation marks omitted)).

Further, were there sufficient bunks to accommodate all inmates once they are classified, inmates would not be required to sleep on the floor. In other words, Defendant's argument implies that floor-sleeping furthers an economic interest in housing more inmates without expending the resources necessary to increase the number of available beds. The Court cannot abide by such a rule. Allowing a cost defense to neutralize constitutional requirements

would permit jails to maintain the most objectively abhorrent and inhumane conditions simply because eliminating them would require additional resources.

Of course, any inquiry into conditions of confinement "spring[s] from constitutional requirements and . . . judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Bell,* 441 U.S. at 539. Los Angeles County Jail is the largest jail in the country. Providing the basic necessities of 19,500 inmates spread across eight custody facilities, numerous patrol stations, and at least 40 courthouses, as well as addressing serious medical, mental health, and security issues, is a complicated enterprise. Therefore, the Court understands that in the case of exigent circumstances, such as a "genuine emergency situation, like a fire or a riot," *Lareau,* 651 F.2d at 108, providing each inmate with a bed may be impossible. *See Anderson v. City of Kern,* 45 F.3d 1310, 1314-15 (9th Cir. 1995) (affirming denial of injunction that would have prevented prison officials from placing violent or suicidal inmates in "safety cell" without a bed for "short periods of time" in the face of evidence that such prisoners used objects, including beds, to harm themselves). However, while the Court has no desire to inject itself in the management of the jail, "'federal courts [must nonetheless] discharge their duty to protect constitutional rights.'" *Rhodes v. Chapman,* 452 U.S. 337, 352 (1981) (quoting *Procunier v. Martinez,* 416 U.S. 396, 405-06 (1974)).

Accordingly, the Court holds as follows:

In the absence of exigent circumstances, the objective prong of the Eighth Amendment requires LASD facilities to assign and provide each inmate with a bunk for the night immediately following the inmate's initial processing within the facility or transfer to a medical center or other place of screening or treatment, and for every night thereafter. Inmates must be processed within a reasonable amount of time. *See Vanke v. Block,* No. CV 98-4111, 2002 WL 1836305, at *1 (C.D. Cal. Aug. 8, 2002) (referring to an order that defendant LASD release those inmates entitled to release within "the period of time that is required to perform the administrative steps incident to release"), *rev'd on other grounds,* 77 F. App'x 948 (9th Cir. 2003). A sudden, extreme rise in inmate population caused by an acute event, such as a civil disturbance, may affect the length of time that is reasonable for processing.[13] However, overcrowding or regular classification considerations do not constitute exigent circumstances that would

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[13] *Cf. Hernandez v. Denton,* 861 F.2d 1421, 1435 (9th Cir. 1988) (holding that a plaintiff who alleged that he "was forced to sleep on a sheet metal bunk without a mattress, for one night" did not state a cognizable constitutional violation but not discussing how long he was in processing or at what time of day or night he entered the cell in question), *vacated on other grounds sub nom. Denton v. Hernandez,* 493 U.S. 801 (1989). *Hernandez* is further distinguishable because it is not a floor-sleeping case; the plaintiff in that case alleged a lack of bedding, not the lack of a bed.

justify floor-sleeping. In general, the Court expects that processing, including any initial medical evaluation, should not take more than twenty-four hours, and, as technology improves, the time should decrease.

2. Deliberate Indifference

Having found that Defendant has established a custom of floor-sleeping in LASD facilities, and that forced floor-sleeping falls below the Eighth Amendment's minimum standards of decency, the subjective "deliberate indifference" prong follows easily. Defendant undeniably knew of the practice; not only does it acknowledge that floor-sleeping occurs (arguing instead that its frequency does not constitute a custom or violate the Eighth Amendment's objective prong), but it is in large part Defendant's own records that convinced the Court of the custom's existence. It is not necessary that Defendant intended to cause Plaintiffs harm. *See Hearns,* 413 F.3d at 1040. Indeed, the Court believes that Defendant would prefer to avoid floor-sleeping. Nevertheless, there is no genuine issue of fact as to whether Defendant had "actual knowledge of the risk" that inmates would be forced to sleep on the floor; that knowledge is sufficient to grant summary adjudication in favor of Plaintiffs. *Id.* 1041 (holding that a "well-documented" string of violence that contravened the Eighth Amendment's objective prong was sufficient to show actual knowledge on the part of prison officials, and

that actual knowledge would constitute deliberate indifference) (internal quotation marks omitted).

3. Policy as the Moving Force Behind the Violation

Plaintiffs must also show that Defendant's custom was "the moving force behind the deprivation of a constitutional right." *Long*, 442 F.3d at 1190. Because the injury – forced floor-sleeping – "would have been avoided" had Defendant changed its custom, *id.*, the Court finds this requirement met as well, and therefore concludes that Plaintiffs are entitled to summary adjudication that Defendant's custom violates the Eighth Amendment. Because the Fourteenth Amendment provides greater protection for inmates, the Court finds that the custom violates that portion of the Constitution as well.

D. Individual Capacity Claim: Qualified Immunity

The parties have filed cross-motions for summary adjudication of the issue of whether Sheriff Baca, in his individual capacity, is legally responsible for the custom of floor-sleeping. The Court rules in favor of Defendant.

Qualified immunity protects from civil liability government officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A

constitutional right is clearly established if "it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Although *Rutherford* and *Thompson* go far in establishing a clear right against floor-sleeping, *Thompson* involved an inmate who had neither bed *nor* mattress, and the court criticized that prison condition on Fourteenth Amendment grounds. Further, neither case speaks to the length of time LASD may allow inmates to wait to receive a bunk while still comporting with constitutional standards. Therefore, it was not unreasonable for Sheriff Baca to believe that the presence of a mattress cured any constitutional defect, and not to realize that floor-sleeping violated the Eighth Amendment as well as the Fourteenth. Accordingly, the Court finds that Sheriff Baca is entitled to qualified immunity and grants summary adjudication on that issue for Defendant in his individual capacity.

IV. CONCLUSION

Based on the foregoing reasons, the Court grants in part and denies in part Plaintiffs' motion, and grants in part and denies in part Defendant's motion.

IT IS SO ORDERED.

Dated: 9-20-07

/s/ Dean D. Pregerson
DEAN D. PREGERSON
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

S.A. THOMAS, Plaintiff, v. LEROY BACA, ~~MICHAEL ANTONOVICH, YVONNE BURKE, DEANE DANA, DON KNABE, GLORIA MCLINA, ZEV YAROSLAVSKY~~, Defendant.	Case No. CV 04-08448 DDP (SHx) **ORDER GRANTING APPLICATION FOR CERTIFICATION OF INTERLOCUTORY APPEAL** [Application filed on October 22, 2007] (Filed Jan. 11, 2008)

This matter comes before the Court upon Defendant's application for certification of an interlocutory appeal of the Court's September 21, 2007 Order Granting in Part and Denying in Part Plaintiffs' Renewed Motion for Summary Adjudication and Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, or, in the Alternative, Summary Adjudication ("Order"). After reviewing the materials submitted by the parties and considering the arguments therein, the Court grants Defendant's motion.

I. BACKGROUND

The facts of this case are known to the parties and set forth in detail in the Order. The Court will

not repeat them here. The Court notes only that Defendant Baca now seeks "certification for interlocutory appellate review the Court's finding that floor sleeping is a per se constitutional violation and that this constitutional determination does not require an individualized examination of the circumstances specific to each incident." (Cert. App. 2.)

II. LEGAL STANDARD

Title 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . . .

28 U.S.C. § 1292(b).

Thus, the three requirements for certification of an interlocutory appeal under § 1292(b) are: "(1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance

the ultimate termination of the litigation." *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd*, 459 U.S. 1190 (1983). This provision is "to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *Id.*

III. DISCUSSION

A. Controlling Questions of Law

The rule in the Ninth Circuit is that an issue need not be dispositive of the lawsuit in order to be "controlling," but it cannot be "collateral to the basic issues of this case." *Id.* at 1027. The Court finds the questions at issue here to be controlling questions of law.

Defendant seeks to certify the question of whether the custom of floor-sleeping in LASD facilities constitutes a per se Eighth Amendment violation. The Court quarrels with the "per se" characterization, as the Order clearly explained that certain exigent circumstances may well justify some incidences of floor sleeping. Nevertheless, the Court agrees that the Order proscribes floor sleeping as a general practice, and that this holding is the central issue in the case. Accordingly, certifying this issue will send to the Ninth Circuit a controlling question of fundamental constitutional law.

B. Substantial Grounds for a Difference of Opinion

The Court is confident that the constitutional holding in *Thomas* flows sensibly from controlling Ninth Circuit and Supreme Court law. However, the Court acknowledges that neither the Supreme Court nor the Ninth Circuit have settled the point at which floor sleeping becomes unconstitutional, and that some courts have concluded that access to a bed and mattress are not part of the basic human necessities protected by the Eighth Amendment. *See, e.g., Tesch v. County of Green Lake,* 157 F.3d 465, 476 (7th Cir. 1998); *Hamm v. DeKalb County,* 774 F.2d 1567, 1575 (11th Cir. 1985). The Court strongly disagrees with these alternate opinions, but acknowledges the debate and agrees it is time for the Ninth Circuit to weigh in. Accordingly, the Court finds the second prong met.

C. Material Advancement of the Ultimate Termination of the Litigation

Finally, the Court finds that certifying this appeal would materially advance the ultimate termination of this litigation. As previously discussed, an interlocutory appeal need not completely end the litigation. *See United States v. Woodbury,* 263 F.2d 784, 787 (9th Cir. 1959). Rather, an "interlocutory appeal must be likely to materially speed the termination of the litigation." *Hansen v. Schubert,* 459 F. Supp. 2d 973, 1000 (E.D. Cal. 2006). "This factor is linked to whether an issue of law is 'controlling' in that the court should consider the effect of a reversal

by the court of appeals on the management of the case." *Id.*

In this case, the as-yet-to-occur trial on the damages is likely to be labor intensive and complicated. It may involve tracking down hundreds of individuals whose whereabouts are, having left LASD custody, presently unknown. If the Court proceeds with this trial and is then reversed in part or in its entirety, the trial will have been a waste of resources because it either will have been completely unnecessary or because it may need to be redone based upon the Ninth Circuit's guidelines. In contrast, if the Court is affirmed, no time will be wasted because Defendant presumably would have appealed after the damages trial in any case. For this reason, and because of the importance of the constitutional question at issue, the Court finds that the "exceptional circumstances" here justify an interlocutory appeal.

IV. CONCLUSION

Based on the foregoing analysis, the Court GRANTS Defendant's application for certification of an interlocutory appeal.

IT IS SO ORDERED.

Dated:
January 11, 2008 /s/ Dean D. Pregerson
DEAN D. PREGERSON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

S. A. THOMAS; et al., Plaintiffs-Respondents, v. LEROY D. BACA, Defendant-Petitioner.	No. 08-80012 D.C. No. CV-04-08448-DDP Central District of California, Los Angeles ORDER (Filed May 20, 2008)

Before: B. FLETCHER and PAEZ, Circuit Judges.

The motion for reconsideration en banc of the panel's April 16, 2008 order is denied on behalf of the court. *See* 9th Cir. Gen. Ord. 6.11.

No further filings related to the April 16, 2008 order shall be accepted in this closed case.

114

(2)

No. 08-447

Supreme Court, U.S.
FILED
DEC 5 - 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LEROY BACA,

Petitioner,

v.

S. A. THOMAS and E. P. GIPSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit properly dismissed petitioner's 28 U.S.C. Section 1292(b) interlocutory appeal of the district court's summary judgment order that petitioner's custom and practice of arbitrary, forced floor-sleeping at the Los Angeles County Sheriff's Department ("LASD") Jail, in the context of overcrowding, is unconstitutional and in violation of the Eighth Amendment and the Fourteenth Amendment Due Process Clause.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. THE DISTRICT COURT'S SUMMARY ADJUDICATION ORDER RELIED ON CONTROLLING NINTH CIRCUIT LAW IN DECIDING THE ISSUE OF WHETHER PETITIONER'S CUSTOM AND PRACTICE OF ARBITRARY, FORCED FLOOR-SLEEPING IN THE CONTEXT OF OVERCROWDING IN THE LASD JAIL SYSTEM CONSTITUTED A CONSTITUTIONAL VIOLATION	4
II. THE DISTRICT COURT CORRECTLY HELD THAT BACA'S CUSTOM AND PRACTICE OF CAUSING INMATES TO SLEEP ON THE FLOOR AT LASD JAIL FACILITIES IS UNCONSTITUTIONAL AND VIOLATES THE EIGHTH AMENDMENT AND THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE	11
III. THE DISTRICT COURT'S ANALYSIS WAS NOT FLAWED NOR WAS IT INCONSISTENT WITH THIS COURT'S HOLDING IN *BELL*	16
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

Allen v. City and County of Honolulu, 816 F.Supp. 1501 (D. Hawaii 1993) 8

Balla v. Board of Corrections, 656 F.Supp. 1108 (D. Idaho 1987), *overruled on other grounds, aff'd in pertinent part, Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461 (9th Cir. 1989) 9, 10

Balla v. Idaho Bd. of Corrections, 2005 WL 2403817 (D. Idaho 2005) 10

Bell v. Wolfish, 441 U.S. 520 (1979) 3, 19, 21

Ferguson v. Cape Girardeau County, 88 F.3d 648 (8th Cir. 1996) 22

Hamm v. DeKalb County, 774 F.2d 1567 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986) 8, 18, 19, 22

Hernandez v. Denton, 861 F.2d 1421 (9th Cir. 1988), *cert. granted, judgment vacated by Denton v. Hernandez*, 493 U.S. 801 (1989), *on remand, Hernandez v. Denton*, 919 F.2d 573 (9th Cir. 1990), *opinion amended and superseded, Hernandez v. Denton*, 929 F.2d 1374 (9th Cir. 1990), *reh'g denied* (1991), *cert. granted, Denton v. Hernandez*, 502 U.S. 937 (1991), *judgment vacated, Denton v. Hernandez*, 504 U.S. 25 (1992), *on remand, Hernandez v. Denton*, 966 F.2d 533 (9th Cir. 1992) 7

Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1981), *reh'g and reh'g en banc denied* (1982) 4, 11, 14

TABLE OF AUTHORITIES – Continued

Page

Hubbard v. Taylor, 538 F.3d 229 (3d Cir. 2008).....19, 20

Jones v. Barnes, 198 Fed. Appx. 756 (4th Cir. 2006).....22

Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981).....17, 18

Lyons v. Powell, 838 F.2d 28 (1st Cir. 1988).....17

Martino v. Carey, 563 F.Supp. 984 (D. Or. 1983).....6

Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).....1

Paige v. Hudson, 341 F.3d 642 (7th Cir. 2003).....22

Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988).....21

Ramirez v. City, County of San Francisco, 1997 WL 33013 (N.D. Cal. 1997).....8, 9

Rutherford v. Pitches, 457 F.Supp. 104 (C.D. Cal. 1978), *aff'd in part and rev'd in part on other grounds,* 710 F.2d 572 (9th Cir. 1983), *rev'd sub nom, Block v. Rutherford,* 468 U.S. 576 (1984).....6

Stewart v. Gates, 450 F.Supp. 583 (C.D. Cal. 1978).....6

Tesch v. County of Green Lake, 57 F.3d 465 (7th Cir. 1998).....21

Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989).....6

Trop v. Dulles, 356 U.S. 86 (1958).....20

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C.A. § 3626 10

28 U.S.C. § 1292(b) 2, 3, 4, 22

42 U.S.C. § 1983 1

FEDERAL STATUTES

Fed. R. Civ. P. Rule 23(b)(3) 1

STATEMENT OF THE CASE

This is a Section 1983 class action for damages brought by respondents S. A. Thomas ("Thomas") and E. L. Gipson ("Gipson"), based on petitioner Sheriff Baca's ("Baca") custom and practice under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), of forcing inmates at the Los Angeles County Sheriff's Department ("LASD") Jail to sleep on the floor in the context of overcrowding. Only petitioner, Sheriff Baca in his official capacity remains as a defendant in this action. The instant action was filed in the Fall of 2004. Class certification was made on May 17, 2005. Pet.App. 3. The dates of class membership were limited and ran from December 18, 2002 through May 17, 2004. Additionally, a tolling provision provided that "[i]ndividuals forced to sleep on the floor 'between December 18, 2000 and December 17, 2002, and who remained in prison until at least December 18, 2002 are also included in the class.'" Pet.App. 3.

The class action was certified by the district court under Fed. R. Civ. P. Rule 23(b)(3) on May 17, 2005. In its September 21, 2007 order the district court held floor sleeping at the LASD Jail unconstitutional under the Eighth Amendment and the Fourteenth Amendment due process clause, thereby finding floor-sleeping unconstitutional both as to convicted prisoners and pretrial detainees. Pet.App. 2-45.

On January 11, 2008, the district court issued an order granting application for certification of

interlocutory appeal under 28 U.S.C. § 1292(b). Subsequently, on April 16, 2008, the Ninth Circuit denied petitioner's request for permission to appeal pursuant to § 1292(b), Pet.App.1, and on May 20, 2008, further denied petitioner's motion for reconsideration *en banc* of the panel's April 16, 2008 Order. Pet.App. 46.

Petitioner mischaracterizes the district court's ruling that respondent's custom and practice of causing inmates to sleep on the floor during the class period was unconstitutional, by repeatedly asserting that the district court held that "'floor-sleeping' is *per se* unconstitutional" (Br. 9), when it did no such thing. Rather, what the district court ***actually*** ruled was that petitioner's "practice of forced floor-sleeping [is] . . . one of the unconstitutional effects of prison overcrowding." Pet.App. 33. The district court did not hold that all floor-sleeping under all circumstances is *per se* unconstitutional. Rather, its conclusion that floor-sleeping at the LASD Jail was unconstitutional was a fact-based decision that rested upon a number of factors, including deposition transcripts of Jail officials, the sworn testimony of both respondents in depositions and a declaration and upon court-ordered record-keeping that established that during the four-month period during which records of floor-sleeping were kept by the LASD Jail itself, there were more than 24,000 instances of floor-sleeping at the Jail. Pet.App. 9-10, 33.

Holding floor-sleeping unconstitutional during riots, or a fire or some other exigency in a jail or prison facility clearly might rise to the level of *per se*

unconstitutional floor-sleeping, but that was not what the district court held to be the case at the LASD Jail during the class period. Floor-sleeping was not a temporary event at the LASD Jail during the class period. Instead it had become an institutionalized norm in overcrowded LASD Jail facilities, as the figures show during the brief time that petitioner was forced to keep court-ordered records of floor-sleeping. Pet.App. 13. Floor-sleeping at the LASD Jail, pursuant to petitioner's policy and practice, was not "reasonably related to a legitimate goal," *Bell v. Wolfish,* 441 U.S. 520, 538-39 (1979). Nor should the question in this case be the "degree of flexibility jail officials are to be afforded in addressing the consistent problem of overcrowding," (Br. 24), a statement seriously at odds with the petitioner's contention throughout his brief that floor-sleeping at the LASD Jail is at most "temporary." Rather, floor-sleeping at the LASD Jail was "arbitrary and purposeless," *ibid,* and certainly, as it pertains to floor-sleeping, petitioner is not entitled to "wide-ranging deference in the adoption and executions of policies and practices in the jails." *Id.* at 548. (Br. 24).

All that petitioner requests is that this Court summarily reverse the Ninth Circuit's order denying permission to bring an interlocutory appeal under 28 U.S.C. § 1292(b). However, because the court below almost certainly would rule in accordance with Ninth Circuit precedent, *see infra,* it would affirm the district court's holding that the petitioner's custom and practice of arbitrary, forced floor-sleeping in the

context of overcrowding in the jail setting was unconstitutional and in violation of the Eighth Amendment and the Fourteenth Amendment Due Process Clause. It was within its discretion for the court below to refuse to entertain the petitioner's § 1292(b) interlocutory appeal, and the petition for certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT'S SUMMARY ADJUDICATION ORDER RELIED ON CONTROLLING NINTH CIRCUIT LAW IN DECIDING THE ISSUE OF WHETHER OR NOT FLOOR-SLEEPING WITHIN THE LASD JAIL SYSTEM CONSTITUTED A CONSTITUTIONAL VIOLATION.

In its carefully reasoned and considered summary adjudication order, Pet.App. 2-45, the district court expressly relied on long-established Ninth Circuit law that conclusively established that forced floor-sleeping caused by jail or prison overcrowding is unconstitutional. Citing *Hoptowit v. Ray,* 682 F.2d 1237, 1248-49 (9th Cir. 1981), *reh'g and reh'g en banc denied* (1982), the court below held that:

> the practice of forced floor-sleeping [is] . . . one of the unconstitutional effects of overcrowding. . . . [in that] overcrowding "may dilute other constitutionally required services such that they fall below minimum Eighth Amendment standards, and it may reach a

> level at which the shelter of the inmates is unfit for human habitation." Forcing inmates to sleep on the floor stoops to that unconstitutional level.

Pet.App. 33. The court below also noted that while it did ***not*** subscribe to

> an interpretation of the Eighth Amendment that protects only inmates who have suffered some external, physical harm as a result of floor-sleeping. . . . Nevertheless, the Court cannot help but note that Plaintiffs in this case ***have*** presented evidence that they suffered significant external harm from the filthy conditions in which they were required to sleep on the floor, including back pain requiring medical treatment, coughing from dust and grime, staphylococcus infections, exposure to leaking sewage, and exposure to cockroaches and vermin.

Pet.App. 33-34, n. 12. That the district court's ruling was specifically aimed at preventing arbitrary, forced floor-sleeping in the context of jail overcrowding is made plain by the court's repudiation of petitioner's implied argument that "floor-sleeping furthers an economic interest in housing more inmates without expending the resources necessary to increase the number of available beds." Pet.App. 35. As the district court put it:

> The Court cannot abide by such a rule. Allowing a cost defense to neutralize constitutional requirements would permit jails to maintain the most objectively abhorrent and

> inhumane conditions simply because eliminating them would require additional resources.

Pet.App. 35-36.

Importantly, the district court based its decision on prior controlling Ninth Circuit law, *e.g.*, *Rutherford v. Pitches,* 457 F.Supp. 104 (C.D. Cal. 1978), *aff'd in part and rev'd in part on other grounds,* 710 F.2d 572 (9th Cir. 1983), *rev'd sub nom, Block v. Rutherford,* 468 U.S. 576 (1984), and *Thompson v. City of Los Angeles,* 885 F.2d 1439 (9th Cir. 1989) (appropriate to presume County maintained a custom of unconstitutional jail conditions in the form of a shortage of beds because "[i]t is a bedrock common law principle that in certain situations, once a condition has been proven to exist, it is presumed in the absence of proof to the contrary that the condition has remained unchanged. 2 J. Wigmore, Wigmore on Evidence § 437 (J. Chadbourn rev. 1979)"). *Id.* at 1449. In fact, both cases uncontrovertibly established that floor-sleeping, with or without a mattress, constitutes a cognizable constitutional claim.

Petitioner's contention to the contrary, ample authority exists within the Ninth Circuit, finding unconstitutional the practice of causing inmates to sleep on the floor. *See Martino v. Carey,* 563 F.Supp. 984, 1002 (D. Or. 1983) (floor-sleeping caused by overcrowding held unconstitutional *both as to detainees and convicted prisoners*); *Stewart v. Gates,* 450 F.Supp. 583, 588 (C.D. Cal. 1978) ("basic concepts of

decency, as well as reasonable respect for constitutional rights, require that [each inmate] be provided a bed").

Petitioner goes far afield to find cases that seemingly are at odds with Ninth Circuit precedent. The Ninth Circuit case, *Hernandez v. Denton,* 861 F.2d 1421 (9th Cir. 1988),[1] cited by petitioner for the proposition that floor-sleeping is insufficient to state an Eighth Amendment violation, is "red-flagged" and is not good law. The *Hernandez* case involved a *pro se* plaintiff whose fanciful complaint that he was raped by prison officials was dismissed as frivolous by the Ninth Circuit, but that decision subsequently was reversed by the Supreme Court in *Hernandez v. Denton,* 493 U.S. 801 (1989). The fact that the Ninth Circuit in *Hernandez* dismissed without leave to amend, the *pro se* plaintiff's claim that he had to sleep for a single night without a mattress, 861 F.2d at 1424, has less than nothing to do with floor-sleeping caused by overcrowding. To describe the *Hernandez* case as constituting "the gap in the law

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[1] The *Hernandez* case has a long and troubled history, in which floor-sleeping due to overcrowding played no part at all. *See Hernandez v Denton,* 861 F.2d 1421 (9th Cir. 1988), *cert. granted, judgment vacated by Denton v. Hernandez,* 493 U.S. 801 (1989), *on remand, Hernandez v. Denton,* 919 F.2d 573 (9th Cir. 1990), *opinion amended and superseded, Hernandez v. Denton,* 929 F.2d 1374 (9th Cir. 1990), *reh'g denied* (1991), *cert. granted, Denton v. Hernandez,* 502 U.S. 937 (1991), *judgment vacated, Denton v. Hernandez,* 504 U.S. 25 (1992), *on remand, Hernandez v. Denton,* 966 F.2d 533 (9th Cir. 1992).

within the Ninth Circuit," (Br. 20), is at best overreaching, at worst, ludicrous. Another case cited by petitioner, *Allen v. City and County of Honolulu,* 816 F.Supp. 1501 (D. Hawaii 1993), also has nothing to do with floor-sleeping caused by overcrowding. *Allen* was a case that involved a *pro se* prisoner's right to safety, in which the *pro se* prisoner claimed that his cellmate had forced him to sleep on the floor with a mattress and had intimidated the plaintiff into giving him the pork and beef that was served with plaintiff's meals, which the plaintiff in any event did not eat for religious reasons. In *Allen* the court cited the primary out-of-circuit case that has caused a circuit split with respect to floor-sleeping in the context of overcrowded jails or prisons, *Hamm v. DeKalb County,* 774 F.2d 1567, 1575 (11th Cir. 1985), *cert. denied,* 475 U.S. 1096 (1986), in ruling that requiring an inmate to sleep on the floor, by itself, does not constitute a constitutional violation. Relying on *Hamm,* the district court thereby was able to conclude that, because it was not clearly established that intimidation and threats by other inmates that do not result in any actual injury state a constitutional violation, the defendants were entitled to qualified immunity. *Allen,* 774 F.2d at 1505. This is a far cry from the institutionalized practice of arbitrary, forced floor-sleeping due to overcrowding adopted by the petitioner for economic reasons. In *Ramirez v. City, County of San Francisco,* 1997 WL 33013 (N.D. Cal. 1997), a case alleging that numerous conditions of confinement violated the pretrial detainee plaintiff's constitutional rights, the only evidence that plaintiff

provided with respect to floor-sleeping was that he himself had to sleep on the floor for three nights. Moreover, unlike the petitioner, who during the class period kept no records of floor-sleeping and merely ignored the problem, hoping it would go away, in *Ramirez* the defendants' efforts included

> use of available space at other facilities; early release of sentenced prisoners; expanded use of jail alternatives; and authorizing supplemental jail funding. Defendant [Sheriff] Hennessey also responded personally to plaintiff's complaints during his incarceration, expressing concern over the situation, and describing his efforts to improve it. (Pl. Dep. at 16.) In another case involving CJ2 (93-2395-WHO), Judge Orrick found that Sheriff Hennessey has "taken every available step open to him in addressing crowding in the San Francisco County jail.

Id. at *4.

More to the point is *Balla v. Board of Corrections,* 656 F.Supp. 1108, 1118 (D. Idaho 1987) (*"Balla II"*), *overruled on other grounds, aff'd in pertinent part, Balla v. Idaho State Bd. of Corrections,* 869 F.2d 461 (9th Cir. 1989). In *Balla II*, the Court held that floor-sleeping was unconstitutional under the Eighth Amendment, stating:

> It is constitutionally prohibited, under the circumstances, for inmates to be housed ***at any time*** in day rooms or other non-designed

> cell areas or ***to be forced to sleep on mattresses on the floor***. *See Fischer v. Winter,* 564 F.Supp. 281 (N.D. Calif. 1983); *Battle v. Anderson,* 447 F.Supp. 516, 525 (E.D. Okla.), *aff'd,* 564 F.2d 388 (10th Cir. 1977). The court does conclude that these constitutional prohibitions be adhered to at all times.

Ibid. (emphases added).

Indeed, as recently as 2005, in *Balla v. Idaho Bd. of Corrections,* 2005 WL 2403817 (D. Idaho 2005) (*"Balla III"*), the court refused to terminate the injunctions established under *Balla I* and *Balla II*, following the defendants' motion to terminate the injunctions pursuant to the procedure set forth in the Prison Litigation Reform Act (PLRA), 18 U.S.C.A. § 3626(b)(1) and (2). In *Balla III*, the court held:

> **IT IS FURTHER HEREBY ORDERED** that no more than two (2) inmates be housed in any cell for any period of time at any time and that ***no inmates be housed at any time in day rooms or other non-designed cell areas or forced to sleep on mattresses on the floor***. This order shall take effect immediately.

Id. at *12 (emphasis added). Thus, there is absolutely no basis for the petitioner's assertion that the issue of floor-sleeping remains unsettled in the Ninth Circuit. (Br. 10).

II. THE DISTRICT COURT CORRECTLY HELD THAT BACA'S CUSTOM AND PRACTICE OF CAUSING INMATES TO SLEEP ON THE FLOOR AT LASD JAIL FACILITIES IS UNCONSTITUTIONAL AND VIOLATES THE EIGHTH AMENDMENT AND THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE.

Petitioner dwells at length on the size of the LASD Jail, and admits that "like many jail and prison systems nationally, the [LASD Jail is] plagued with overcrowding." (Br. 7). Overcrowding, in fact, as petitioner admits is the root cause of floor-sleeping at the LASD Jail. *See Hoptowit,* 682 F.2d at 1248-49:

> Overcrowding itself is not a violation of the Eighth Amendment. It can, under certain circumstances, result in specific effects which can form the basis for an Eighth Amendment violation. Overcrowding can cause increased violence, *see Wolfish v. Levi, supra,* 573 F.2d at 127, it may dilute other constitutionally required services such that they fall below the minimum Eighth Amendment standards, and it may reach a level at which the shelter of the inmates is unfit for human habitation.

In this certified class action for damages, the district court found that the respondents Thomas and Gipson, had experienced floor-sleeping at the LASD Jail that was typical of the absent class members. Rather than the "clean, dry, well lit area, with adequate bedding (such as mattresses and blankets) and space," (Br. 7), euphemistically extolled by petitioner,

respondent Gipson's floor-sleeping experience during 2004 at Men's Central Jail, the main LASD Jail facility, was more representative of floor-sleeping as it occurred at the LASD Jail during the class period. Mr. Gipson, a pretrial detainee, Pet.App. 21-22, described one of his experiences of floor-sleeping during the year 2004, as follows:

> THE WITNESS: Okay. The cell is about 6 feet by 12 feet, I guess, or 8 feet by 12. It has six bunks and a toilet. And I had to sleep on the floor in that cell on a wet mattress that was by the toilet.

Pet.App. 23.

During processing into the Jail in 2004, Mr. Gipson spent approximately 48 hours in a holding cell with as many as 200 other inmates. The holding cell had twenty benches, each of which seated ten people, but there was nowhere to sleep except on the floor. Pet.App. 22. Mr. Gipson then was removed to a second cell that was "maybe 10 by 20 . . . [where there were] people laying down like snakes huddled all up together trying to get rest because they're tired from being up for 48 hours or whatever." *Ibid.* Mr. Gipson spent another day or two in a similar cell again without a bunk, and when finally moved into a Jail module, "he was assigned to a day room without a bunk on which to sleep," and where the only space available for him to place his mattress was directly under the staircase. *Ibid.* On yet another occasion in 2004, Mr. Gipson and 60 other inmates were required to sleep on the floor of a Jail shower. Pet.App. 23.

Mr. Gipson graphically described the conditions under which he was forced to sleep on the floor:

> [Plaintiffs' Counsel]: What conditions [in the jail] are you talking about?
>
> . . . .
>
> THE WITNESS: Okay. Five days of processing, . . . just sitting on benches until you fall off into – you're just so tired, you lay on the floor and you just wait and wait and wait. And you're laying down with – packed on the floor, cement, cold, with no blanket, nothing . . . and it's just 40 men in a 10-man day tank.
>
> [Plaintiffs' Counsel]: What about at night?
>
> THE WITNESS: It didn't matter if it was – you didn't know if it was day or night. It just didn't matter. You were just there until you fall out. And you have to rest. So you end up on the floor with 30 other guys . . . until you said you're not going to lay down on the floor, but you just don't have a choice. You know, that breaks you. It makes you feel bad.
>
> Q. How does that in particular make you feel bad?
>
> A. Because, after that, you finally get processing [*sic*] and they send you to a dirty, nasty cell, a six-man cell or a five-man cell, and you're the sixth man, and you got to sleep under a bunk.

> And you think about hurting somebody. You think about – you're bigger than that guy that's got a bunk, and you want to take him off the bunk and smash him down and take his bunk, but, you know, why you have to do this? Why should I have to go through that? You think about that, and it just tears you up inside.
>
> And then you sleep on the floor and your back hurts and you're in pain. . . . You can't do nothing. You feel like you're just in a bad nightmare, like a – you know, they used to talk about prisons in other countries, but that's right here in Los Angeles County jail, the same conditions.

Pet.App. 23-24. Vermin and roaches were observed on a daily basis by Mr. Gipson. The bedding he was provided with was wet, the rooms on whose floors he slept were "molded [*sic*] and mildewed." Mr. Gipson believed that a staphylococcus infection on his left heel that required hospitalization was contracted from standing water on the cell floor on which he was required to sleep. Pet.App. 25 n. 7. Mr. Gipson's floor-sleeping experiences exemplify the conditions decried in *Hoptowit,* including exacerbating any propensity for violence. *Id.* at 1248-49.

Mr. Thomas, a post-conviction inmate, Pet.App. 25, fared no better. Forced to sleep on the floor of a day room that was "very crowded," in which inmates' mattresses were crammed together with "only ten inches between my mattress and the mattress of another inmate," *ibid,* the only place Mr. Thomas

could find to place his mattress was "under a stairway leading up to a second tier which housed suicidal inmates." *Ibid.* Unsanitary conditions were also reported by Mr. Thomas, who developed "chronic back and shoulder pain during the period he was forced to sleep on the floor." Pet.App. 25-26, n. 8.

These descriptions of floor-sleeping as it was practiced by the petitioner in the LASD Jail facilities during the class period are in sharp contrast with the petitioner's claim that the district court's order rested on a "blanket rule" that "if the inmate does not have a bunk there is a constitutional violation regardless of the specific nature and overall quality of the inmate's sleeping arrangements." (Br. 8). In fact the district court engaged in exactly the type of individualized factual inquiries necessary to "determine whether an inmate's sleeping conditions rise to the level of a constitutional violation." *Ibid.*

Because during the class period, no records of floor-sleeping were kept by the petitioner, on May 17, 2005, the district court, at respondents' request, ordered record-keeping for the period from May 29, 2005 to September 29, 2005, from which the respondents "compiled summaries of floor-sleepers in six LASD facilities." Pet.App. 13. Record-keeping during that period yielded 24,688 instances "where individuals were required to sleep on the floor." A second summary listed 5,282 individuals who were required to sleep on the floor for more than one night, the majority of whom slept on the floor between two and seven nights. *Ibid.* Thus, extrapolating from the

floor-sleeping figures uncovered by court-ordered record-keeping during that four-month period, there were at least 35,000 plus floor-sleepers who slept on the floor between two and seven nights during the class period. As petitioner concedes, the "Los Angeles County Jail processes almost 200,000 inmates per year." (Br. 7). Annualized, the 24,688 instances of floor-sleeping would amount to 74,064 instances of floor-sleeping, so that somewhat more than a third of all Jail inmates would be required to sleep on the floor for one night during the class period. However, at least during the record-keeping period, those unfortunates who slept on the floor did not do so for a single night. Moreover, it is likely that, because there was no floor-sleeping record-keeping during the class period, that inmates forced to sleep on the floor did so for much longer periods of time than the "between two and seven days" that individuals slept on the floor during the record-keeping period, when the impetus of record-keeping would have stimulated the petitioner into insuring that inmates who previously would have spent longer periods on the floor were provided with a bunk.

III. THE DISTRICT COURT'S ANALYSIS WAS NOT FLAWED NOR WAS IT INCONSISTENT WITH THIS COURT'S HOLDING IN *BELL*.

Not only is the district court's ruling that floor-sleeping is unconstitutional as practiced by petitioner in the LASD Jail in accord with Ninth Circuit

precedent, other circuits also have held arbitrary, forced floor-sleeping in the context of jail or prison overcrowding, unconstitutional. In *Lareau v. Manson,* 651 F.2d 96, 105 (2d Cir. 1981), the court held that the use of floor mattresses was "too egregious to warrant any such leeway" and "constitute[d] punishment without regard to the number of days for which a prisoner is so confined."

In *Lyons v. Powell,* 838 F.2d 28, 31 (1st Cir. 1988), the court reversed the district court's dismissal of a *pro se* pretrial detainee's claims that he was forced to sleep on a mattress on the floor for 27 days, stating:

> We are persuaded by the rulings of our sister circuits that subjecting pretrial detainees to the use of a floor mattress for anything other than brief emergency circumstances may constitute an impermissible imposition of punishment, thereby violating the due process rights of such detainees.

The court in *Lyons* also extensively analyzed the holdings of courts that have held floor-sleeping unconstitutional primarily in the context of overcrowded prisons or jails, stating:

> In *Lareau v. Manson,* 651 F.2d 96 (2d Cir. 1981), the Second Circuit held that double-bunking of pretrial detainees was constitutionally permissible for a period of no more than 15 days, but that the use of floor mattresses constituted punishment "without regard to the number of days for which a prisoner is so confined." *Id.* at 105. This

sentiment was echoed by the Third Circuit in *Union County Jail Inmates v. Di Buono,* 713 F.2d 984 (3d Cir. 1983), *cert. denied,* 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 (1984). The court recognized that overcrowded prison conditions did not justify forcing pretrial detainees to sleep on floor mattresses for more than a few days. *Id.* at 994. The court noted that "the only condition not meeting constitutional standards [] was the practice of placing a mattress on the floor for the second occupant of a cell designed for but one inmate." *Id.* The clear implication of the court's language was that double-bunking and use of floor mattresses would only be constitutionally permissible if they were used in exigent circumstances for extremely brief periods of time. With respect to the use of floor mattresses in prisons, *see also Anela v. City of Wildwood,* 790 F.2d 1063 (3d Cir. 1986), *cert. denied*, 479 U.S. 949, 107 S.Ct. 434, 93 L.Ed.2d 384 (absence of mattresses unconstitutional in light of *Lareau* and *Union County, supra,* finding floor mattresses unconstitutional for pretrial detainees); *Inmates of Allegheny County Jail v. Wecht,* 565 F.Supp. 1278 (W.D.Pa. 1983), *aff'd. in rel. part*, 754 F.2d 120 (3d Cir. 1985) (totality of conditions at prison resulting from overcrowding, including use of floor mattresses, rose to level of constitutional violation for both pretrial detainees and inmates). *Contra Hamm v. De Kalb County,*

> 774 F.2d 1567 (11th Cir. 1985) (no punishment for detainee to sleep on floor or table temporarily so long as not required arbitrarily).

Id. at 30.

Admittedly at odds with the Ninth Circuit precedent is the Eleventh Circuit's ruling in *Hamm, supra.* In *Hamm* the court held:

> The district court likewise applied the correct standards to Hamm's claims concerning sleeping arrangements and overcrowding at the jail. The fact that Hamm temporarily had to sleep upon a mattress on the floor or on a table is not necessarily a constitutional violation. *See Crowe v. Leeke,* 540 F. 2d 740-41 (4th Cir. 1976); *cf. Bell,* 441 U.S. at 541-43, 99 S.Ct. 1875-76 (upholds the practice of "double-bunking").

Id. at 1575. In reaching its conclusion that floor-sleeping is not unconstitutional, in *Hamm* the court noted, "[t]he Supreme Court, however, has not set forth a standard for determining what level of necessities the due process clause absolutely requires." *Id.* at 1574.

The Third Circuit, in *Hubbard v. Taylor,* 538 F.3d 229 (3d Cir. 2008), employing a totality of the circumstances analysis, similarly held that floor-sleeping in the context of overcrowding did not constitute punishment and therefore was not unconstitutional. In *Hubbard,* the plaintiffs alleged that:

> they had to sleep on floor mattresses for extended periods of time as a result of triple-celling, with most spending between three and seven months on a mattress while waiting for one of the bunk beds to become available. They allege that this resulted in "extreme discomfort and disease" as well as the "regular splash[ing]" of urine and feces from the nearby toilet; moreover, two of the Plaintiffs claim to have suffered injuries as a result of the mattresses.

Id. at 234.

Nonetheless, the court in *Hubbard* held that floor-sleeping due to overcrowding that involved the triple-celling of pretrial detainees and that included one inmate sleeping on the floor on a mattress in each cell for an extended period of time, was not unconstitutional. Thus, in *Hubbard*, the court took the Court's ruling in *Bell* that double bunking was not unconstitutional, one step further.[2] In *Hubbard* the court justified its holding that triple-celling, with a third inmate sleeping on the floor, was not unconstitutional based on the Court's statement in *Bell* that, because the detainees' rooms

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[2] Or, perhaps, backwards, for certainly concluding that forced floor-sleeping due to overcrowding is sanctioned by *Bell* is the antithesis of this Court's holding in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

> "provide more than adequate space for sleeping," 441 U.S. at 543, 99 S.Ct. 1861, it thus 'fail[ed] to understand the emphasis . . . on the amount of walking space' in the cells." *Id.* at 543 n. 26, 99 S.Ct. 1861.

Many of the cases gang-cited by the petitioner have nothing to do with arbitrary floor-sleeping in the context of prison or jail overcrowding. (Br. 8 & 11). *Tesch v. County of Green Lake,* 57 F.3d 465 (7th Cir. 1998), is a salient example. In *Tesch,* the wheelchair bound plaintiff who was afflicted with muscular dystrophy spent 44 hours in a cell that was outfitted for disabled individuals, complete with a bed that was permanently affixed to the floor, consist[ing] of a steel platform on steel legs with a removable mattress on top . . . [that] was positioned in the cell to provide maximum clearance for wheelchairs." *Id.* at 469. Because no grab bars were installed by the bed, and guards refused to help the plaintiff onto the bed, he was forced to pull the mattress off the bed and sleep on the floor. *Ibid.* However, the callous, deliberate indifference of a few individual guards during a period that the court in *Tesch* held was not of a sufficiently long duration to amount to a form of punishment, *id.* at 476, is scarcely analogous to a system-wide custom and practice of causing floor-sleeping in Bedlam-like conditions due to overcrowding. Also inapposite but cited by petitioner (Br. 8 & 11) are the cases of *Peterkin v. Jeffes,* 855 F.2d 1021 (3d Cir. 1988) (broad-ranging conditions of confinement class action brought by death row prisoners that primarily centered around the amount of time (22 hours) the

death row inmates spent in their cells, and access to the library and to legal counsel); *Jones v. Barnes*, 198 Fed. Appx. 756 (4th Cir. 2006) (an unpublished *per curiam* opinion that specifically states that unpublished opinions are not precedent in the Fourth Circuit that merely summarily affirmed the district court's order "on the modified ground that Jones failed to state a claim for improper prison conditions and medical mistreatment." *Id.*); *Ferguson v. Cape Girardeau County*, 88 F.3d 648, 650 (8th Cir. 1996) (pretrial detainee plaintiff's 13 days of floor-sleeping with a mattress was the result of his being placed in a vestibule where he was under constant observation, both to monitor his medical condition [he had been complaining of chest pain] and because he was perceived to be dangerous); *Paige v. Hudson*, 341 F.3d 642 (7th Cir. 2003) (whether plaintiff's removal from a home detention program into jail deprived him of a liberty interest.).

Indisputably, *Hamm* and its progeny create a circuit conflict on this important matter. However, the law in the Ninth Circuit was clearly established that arbitrary, forced floor-sleeping caused by overcrowding in the jail/prison setting is unconstitutional, and the Ninth Circuit was well within its discretion in denying petitioner's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

CONCLUSION

For the reasons set forth, the petition for writ of certiorari should be denied.

Respectfully submitted,

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